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No. 99-1880

In The

Supreme Court of the United States

GRAEME FREEMAN, et al.,

Petitioners,

v.

BURLINGTON BROADCASTERS, INC.,
d/b/a WIZN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT NYNEX MOBILE LIMITED PARTNERSHIP 1 d/b/a VERIZON WIRELESS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Courts below correctly held that Congress has conferred exclusive jurisdiction on the Federal Communications Commission over complaints of radio frequency interference lodged against all transmitting sources.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent, NYNEX Mobile Limited Partnership 1 d/b/a Verizon Wireless (f/d/b/a Bell Atlantic NYNEX Mobile and Bell Atlantic Mobile), by its attorneys, Burak Anderson & Melloni, PLC, respectfully submits this Corporate Disclosure Statement.

NYNEX Mobile Limited Partnership 1 is a Delaware Limited Partnership of which Cellco Partnership is the Managing General Partner. Cellco Limited Partnership is owned by the following entities: Bell Atlantic Cellular Holdings Limited Partnership, NYNEX PCS, Inc., PCSCO Partnership (each of these three entities is owned by Bell Atlantic Corporation, a publicly-traded company), PCS Nucleus Limited Partnership, JP Partner Company Limited Liability Partnership and Airtouch Paging (each of these entities are owned by Vodaphone Airtouch, PLC of the United Kingdom, a publicly-traded company). It is anticipated that Bell Atlantic Corporation will merge with GTE Corporation, a publicly-traded company, shortly.

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STATEMENT OF THE CASE

On August 11, 1997, the United States District Court for the District of Vermont granted the Motion to Dismiss filed, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), by Respondent, NYNEX Mobile Limited Partnership 1 d/b/a Verizon Wireless ("Verizon Wireless").[1] *In re Appeal of Graeme and Mary Beth Freeman, et al.*, 975 F.Supp. 570 (D.Vt. 1997). Verizon Wireless based that motion on the exclusive jurisdiction of the Federal Communications Commission ("FCC") over complaints of radio frequency interference ("RFI") lodged against all transmitting sources. Due to this exclusive jurisdiction and because the underlying action solely concerned RFI complaints alleged against such sources, the District Court correctly dismissed that action.

Upon further appeal, the Second Circuit affirmed the District Court's ruling, holding that the FCC's exclusive jurisdiction prevents any state or local authority from taking action based on RFI complaints against any transmitting source. *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) (Newman, J.). The Second Circuit also directed the District Court to modify its judgment to reflect the affirmance of the earlier decision of the Charlotte, Vermont Zoning Board of Adjustment (the "ZBA"). *Id.* at 325. That earlier decision also found exclusive FCC jurisdiction over the RFI complaints that are the subject of this action.

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[1] This limited partnership formerly did business as Bell Atlantic NYNEX Mobile and Bell Atlantic Mobile.

REASONS FOR DENYING THE WRIT

The Petitioners ask this Court to ignore the well-established body of law on which the Second Circuit and the District Court relied and, thereby, to abrogate the FCC's long-standing, exclusive jurisdiction over RFI complaints. However, all of the federal appellate courts that have decided this issue have ruled that the FCC's exclusive jurisdiction in this area preempts state and local efforts to regulate RFI. Further, all of the federal district courts and all of the state courts of last resort that have faced this issue have reached the same result. Finally, the administrative decisions rendered by the FCC itself uphold this principle unanimously.

This uniformity stems from clear statements made over a long period of time by this Court and the Congress. Indeed, this Court has consistently held that the FCC has exclusive jurisdiction over the technical areas of broadcasting. *See, e.g., Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 430 n.6 (1963) (contrasting regulation of advertising with "the [FCC's] jurisdiction over technical matters such as a frequency allocation, over which federal control is clearly exclusive"). This jurisdiction stems from the goals and policies evident in the Federal Communications Act of 1934 (the "FCA"). *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (FCA manifests Congress' intent to "maintain . . . a grip on the dynamic aspects of radio transmission").

Congress again expressed its intent with regard to regulation of RFI when it amended the FCA in 1982. In a pointed summary of its purposes in crafting those

amendments, a joint conference committee of the House and Senate stated:

> The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the [FCC] over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the [FCC].

H.R. Conf. Rep. No. 97-765, at 33 (1982) (the "Committee Report"), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2277, *quoted in Freeman*, 204 F.3d at 321; Pet. App. 233a. Hence, the legislative history of the provision in question demonstrates Congress' intent to preempt the field of RFI complaints directed at all transmitting sources.

The RFI issues presented by this case stem from a condition imposed by a municipal zoning board purportedly requiring a permit holder to take action to prevent and remedy RFI complaints.[2] The Second Circuit correctly followed the line of cases that have confirmed the FCC's exclusive jurisdiction over such complaints and

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[2] The ZBA found that there was "no credible evidence" that Verizon Wireless is the cause of the RFI alleged by the Petitioners, a finding noted by both the District Court and the Second Circuit. *In re Appeal of Freeman*, 975 F.Supp at 572; *Freeman*, 204 F.3d at 323 n.10.

ruled that the condition at issue is unenforceable. *Freeman*, 204 F.3d at 325 (citing cases). In so doing, that court properly applied the test developed by this Court for field preemption. *Id.* at 320, *citing English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990).

Because of this well-established body of law, the question presented by the Petitioners does not warrant the grant of their Petition. Indeed, the legislative, executive and judicial branches are in complete accord that the issue has been resolved in favor of the FCC's exclusive authority. Neither does this case present an issue of "first impression" in this Court. *Contrast* Pet. 5 *with Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir.), *cert. denied*, 511 U.S. 1128 (1994) *and Southwestern Bell Wireless, Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3631 (U.S. May 30, 2000). In sum, Petitioners present no compelling reason for this Court to grant the writ that they seek.

I.

CONGRESS HAS DEMONSTRATED ITS INTENT TO CONFER EXCLUSIVE JURISDICTION OVER RFI INCIDENTS ON THE FCC

RFI arises when signal radiation by a transmitter is picked up by an electronic device in such a manner that it prevents the clear reception of another and desired signal or causes a malfunction of some other electronic device. Committee Report at *5; Pet. App. 202a.[3] In this matter,

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[3] Hence, as an initial matter, RFI is a phenomenon that affects the performance of devices and not a matter of "health

the Petitioners ask this Court to assert jurisdiction over RFI complaints directed at operators of FCC-licensed transmitters. However, the FCC has plenary and exclusive jurisdiction over RFI complaints lodged against all transmitting sources.

A. The Regulatory Regime Created by the FCA Confers Exclusive Jurisdiction over RFI on the FCC

Congress created the FCC with the passage of the FCA. In section 301 of that Act, Congress explicitly stated that its purpose in doing so was: "among other things, to maintain control of the United States over all channels of radio transmission . . . " and that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . . when interference is caused by such use or operation. . . . " 47 U.S.C. § 301. This Court has confirmed that Congress' intent was to create a uniform system of federal regulation over all technical aspects of radio transmission. *Pottsville Broad. Co.*, 309 U.S. at 138.

Subsequently, this Court held that one of Congress' primary reasons for creating the FCC was to eliminate the

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and safety" as the Petitioners imply. Pet. 4; *Freeman*, 204 F.3d at 325. Neither does RFI present issues of visibility or other aesthetic effects. Hence, Petitioners misplace their reliance on the cases that uphold state and local authority over such "traditional bases" of zoning and planning as "preserving the character of the neighborhood" and "avoiding aesthetic blight." Pet. 18-19; *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 427 (4th Cir. 1998).

"confusion and chaos" caused by the rapid increase in the number of radio transmitters and a lack of unified, national control. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 212-14 (1943); *see also Head*, 374 U.S. at 430 n.6; *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (FCC created to serve as "the single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio") (footnotes and internal quotation marks omitted). This Court has not reached a contrary result.

B. The 1982 Amendments of the FCA Extend the FCC's Exclusive Jurisdiction

In 1982, Congress amended the FCA to expand the FCC's regulatory authority to encompass devices susceptible to receiving RFI. Congress observed that commercial receiving devices were generally not vulnerable to RFI and did not need to be regulated. However, Congress also found that the manufacturers of consumer receiving devices were not voluntarily building their equipment to reject RFI:

> While almost any transmitter of any service is a potential interference source, amateur or citizens band (CB) stations are very often associated with RFI problems involving electronic devices in the home . . . Appropriate rules of the [FCC] require all transmitters of all services, including the transmitting sections of transceivers, to suppress spurious radiation. It has become evident that many interference problems involving home electronic equipment and

> systems are not fully resolvable but that resolution of some interference problems may require action with respect to receivers and other electronic devices picking up unwanted signals.

Committee Report at *11, Pet. App. 202a-203a. In other words, Congress now believed that it should regulate the devices that receive RFI as well as those whose transmissions cause RFI.

In deciding to exercise this regulatory authority, Congress specifically examined the receiving devices that were causing the problem. In unambiguous terms, Congress placed blame on the manufacturers:

> The Conferees wish to emphasize that it was its hope that voluntary efforts by manufacturers to reduce RFI when possible, as opposed to the use of government regulation, would be sufficient.

Id. at *37, Pet. App. 230a. Congress further made clear that not all manufacturers were at fault and drew a sharp distinction between those manufacturing commercial devices (which were adequately protected against RFI) and those manufacturing consumer devices (which were not):

> Devices designed and marketed for use in a commercial environment normally include necessary protection against interference and do not require [FCC] regulation. In the market for home devices, however, good faith industry attempts to solve this interference problem have not always been as successful. Thus, in view of complaints regarding home devices, the conferees believe that [FCC] authority to impose

> appropriate regulations on home electronic equipment and systems is now necessary to insure that consumers' home electronic equipment and systems will not be subject to malfunction due to RFI.

Id. at *37, Pet. App. 230a-231a.

In other words, Congress sought to address the specific problem of RFI complaints stemming from inadequate protection against RFI in consumer devices by expanding the FCC's exclusive jurisdiction to cover those devices. That agency's exclusive authority over transmitters had already existed for nearly 50 years.

C. In the Course of Adopting the 1982 Amendments, Congress Reiterated the FCC's Exclusive and Plenary Jurisdiction Over All RFI Matters

Even as it broadened the FCC's authority in this manner, Congress reemphasized that the FCC retained exclusive jurisdiction over RFI complaints against all transmitting sources:

> [T]he conferees wish to clarify that the exclusive jurisdiction over RFI incidents (including preemption of state and local regulation of such phenomena) lies with the FCC.
>
> . . . .
>
> The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the [FCC] over matters involving the RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting

> apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint.

Id. at *15, *39, Pet. App. 207a, 233a. Hence, the distinction urged by the Petitioners – for RFI complaints against transmitters based on interference to consumer devices rather than business devices – has no relevance to this case. The FCC has exclusive jurisdiction over RFI complaints directed at all transmitting sources.[4] Indeed, when confronted with these unambiguous statements of legislative intent at oral argument below, Petitioners conceded that the distinction between consumer and business devices makes no difference. App. 90a-91a.

D. Cases Decided After the 1982 Amendments Uphold the FCC's Exclusive Jurisdiction over RFI

In the intervening years, several courts have held that the FCC continues to have exclusive jurisdiction over all RFI complaints against FCC licensees. *See Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir.) (FCC has exclusive jurisdiction over the regulation of RFI), *cert. denied*, 511 U.S. 1128 (1994); *Southwestern Bell Wireless, Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185 (10th Cir. 1999) (rejecting contentions that 1996 amendments to FCA alter FCC's exclusive jurisdiction over RFI in context of local land use permit condition), *cert. denied*, 68

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[4] Given the prevalence of personal computers at work, fax machines at home and the like, this distinction would prove extremely difficult to apply in practice. *See Freeman*, 975 F.Supp. at 575 (reference to "computers in the home" and "computers at work").

U.S.L.W. 3631 (U.S. May 30, 2000); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) (decision from which Petitioners have sought review); *Great Lakes Wireless Talking Machine Co. d/b/a WZSH 95 FM v. Hayes, et al.*, CIV-91-6140T (W.D.N.Y. June 25, 1991) (operators of FCC-licensed transmitters answer only to FCC regarding RFI matters); *Still v. Michaels*, 791 F.Supp. 248 (D. Ariz. 1992) (all claims that would obstruct FCC's ability to regulate radio frequencies are preempted)[5]; *Blackburn v. Doubleday Broad. Co.*, 353 N.W.2d 550 (Minn. 1984) (subject matter of RFI lies within FCC's exclusive jurisdiction); *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky. 1984) (state court lacks jurisdiction to control, regulate or prohibit radio transmissions of an FCC-licensed transmitter that interfered with county police radio communications system – non consumer devices); *Smith v. Cavalry Educational Broad. Network*, 783 S.W.2d 533 (Mo. App. 1990) (FCC has exclusive jurisdiction over

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[5] In *Still*, the district court ruled that federal preemption deprived all courts of subject matter jurisdiction over RFI claims directed at amateur radio operators. *Id.*, 791 F.Supp. at 251-53; *but see Winfield Village Cooperative v. Ruiz*, 537 N.E.2d 331 (Ill. App.) (court allows landlord to maintain eviction action against tenant/amateur radio operator who caused RFI), *appeal denied*, 545 N.E.2d 135 (Ill. 1989). It appears that no court has followed, or even cited *Winfield Village*, other than to distinguish it and limit its holding. *See Southwestern Bell*, 199 F.3d at 1192 (attributing holding of *Winfield Village* to fact that breach of contract action is "private in nature" and does not involve state regulation). Further, the *Winfield Village* court allowed claims of RFI affecting consumer devices to stand, a position that even the Petitioners concede is untenable. *Compare id.*, 537 N.E.2d at 331 (interference with "consumer electronic equipment") *with* Pet. 22.

complaints of RFI to electrical and electronic appliances located in plaintiffs' homes or businesses); *Still v. Michaels*, 803 P.2d 124 (Ariz. Ct. App. 1990) ("federal regulation of [RFI] matters is exclusive"), *review denied* (Ariz. 1991); *Fetterman v. Green*, 455 Pa. Super. 639, 689 A.2d 289 (Pa. Super. Ct.) (upholding federal RFI preemption after enactment of 1996 amendments to FCA), *appeal denied*, 695 A.2d 786 (Pa. 1997); *Monfort v. Larson*, 693 N.Y.S.2d 286, 289 (N.Y. App. Div. 1999) ("radio signal interference at issue *sub judice* falls within the FCC's technical domain"), *leave to appeal dismissed*, 705 N.Y.S.2d 7 (N.Y. 2000); *cf. Goforth v. Smith*, 991 S.W.2d 579 (Ark. 1999) (state law action to remedy environmental effects of RF emissions preempted).

Significantly, the FCC's administrative rulings have reached the same result. *See In the Matter of 960 Radio, Inc.*, 1985 FCC LEXIS 2342, at *78-85 (Oct. 29, 1985) ("federal power in the area of [RFI] is exclusive; to the extent that state or local government attempts to regulate in this area, their regulations are preempted"); *In the Matter of Mobilecomm of New York, Inc.*, 2 F.C.C.R. 5519 (1987) (the FCA comprehensively regulates RFI and occupies that field); *Southwestern Bell*, 199 F.3d at 1192 (courts defer to FCC decisions that address preemption of local regulation of RFI issues), *citing City of New York v. FCC*, 486 U.S. 57, 64 (1988).

E. The Abrogation of this Body of Law, for which the Petitioners Argue, Would Create an Unworkable Set of Conflicting Regulations

In addition, a core purpose of the FCC would be stymied by allowing each state and locality to formulate

its own technical standards in the complex area of RFI and the resulting imposition of liability on FCC licensees. If such an outcome were allowed, operators of radio transmitters and the public would soon face inconsistent and conflicting technical standards.

Such a regime would pose special difficulties for the operator of a multi-state, wireless communications network such as Verizon Wireless. The provision of a uniform quality of service would be impossible if such service providers faced varying technical regulations in each municipality in which they operated. Indeed, the chaos and confusion that Congress attempted to eliminate when it created the FCC would carry the day.

II.

THE SECOND CIRCUIT CORRECTLY APPLIED THE *CIPOLLONE* FIELD PREEMPTION TEST

Acknowledging that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), states the applicable test for field preemption, Petitioners nevertheless claim the Second Circuit "failed to apply the test properly." Pet. 8. A brief review of the Second Circuit's field preemption analysis confirms that the Court correctly applied the *Cipollone* test.

Initially, the Second Circuit recognized that congressional intent is the "ultimate touchstone" in preemption analysis. *Freeman*, 204 F.3d at 320, *quoting Cipollone*, 505 U.S. at 516. Having properly laid out the test and guidelines for field preemption, the Second Circuit exhaustively analyzed the applicable statutes, legislative history, FCC regulations and that agency's interpretation

of the scope of preemption. *Freeman*, 204 F.3d at 320-22. That Court then addressed and rejected Petitioners' arguments that federal law authorizes local regulation of RFI. *Id.* at 322-25. After engaging in this comprehensive field preemption analysis, the Second Circuit correctly concluded that:

> [a]llowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in delegating regulatory power to the FCC for uniform regulation of broadcast technologies.

Id. at 325 (internal quotation marks and citations omitted); *accord Southwestern Bell*, 199 F.3d at 1193-94 ("the statutes and legislative history support Congress's intent to occupy the field of RFI issues").

III.

THE TENTH AMENDMENT PRESENTS NO BARRIER TO THE APPLICATION OF FIELD PREEMPTION IN THIS CASE

A. Field Preemption Does Not Violate the Tenth Amendment

Petitioners appear to argue that all types of implied preemption, including field preemption, violate the Tenth Amendment *per se*. *See* Pet. 10, 12 (contending that Congress' alleged failure to "affirmatively act" to preempt state regulation of RFI causes the parties to "drop into the safety net of the Tenth Amendment," and that therefore "the zoning laws of the small Vermont town of Charlotte

are the authority that rules this application"). This Court has never reached such a result, and the decided cases lead to the opposite conclusion. *See Printz v. United States*, 521 U.S. 898, 919 (1997) (the Tenth Amendment expressly confirms the residual state sovereignty implicit in "the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. . . . ").

Indeed, the Tenth Amendment provides only that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., AMEND. 10. This Court has described that Amendment as "essentially a tautology," which merely confirms that "the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992).

As a corollary, is settled law that:

> [i]n the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it."

Cipollone, 505 U.S. at 516 (internal quotation marks and citations omitted). There is nothing incongruous about a system of residual state sovereignty in which federal law can impliedly occupy an entire legislative field. As this Court has explained:

> Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or

> implicitly contained in its structure and purpose." Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because . . . "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982) (citations omitted). Hence, field preemption continues to be a viable doctrine, fully applicable to this case. *See Crosby v. Nat'l Foreign Trade Council*, No. 99-474, 2000 WL 775550, at *6 (U.S. June 19, 2000) ("When Congress intends to occupy the field, state law in that area is preempted.") (citations and internal quotation marks omitted); *see also Southwestern Bell*, 199 F.3d at 1193-94 (rejecting argument that field preemption of RFI violates the Tenth Amendment); *cf. Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (rejecting argument that exclusive jurisdiction of FCC over radio frequency radiation violates the Tenth Amendment).

B. Petitioners Did Not Preserve Their Tenth Amendment Argument Below.

Petitioners' avowal that their constitutional argument was "briefed and argued" to the Second Circuit is incorrect. Pet. 12. Neither of the two fleeting Tenth Amendment references in Petitioners' Second Circuit briefs asserts that the field preemption doctrine is unconstitutional or explains why that Amendment applies to this case. App. 9a, 22a. Further, Petitioners never so much as

mentioned the Tenth Amendment during the Second Circuit oral argument. *Id.* 73a-92a. Petitioners' failure to make the constitutional argument below supplies an ample basis to deny certiorari on the issue. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not raised or involved in the lower court"); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.26, at 364 (6th ed. 1986).

CONCLUSION

For all of the foregoing reasons, Respondent, Verizon Wireless respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

97-9141

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, Willaim Pinney, Jr., Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmody, Mark Musiel, Michael Yantachka, Lorie Gaboury, Chris McGee, Peter Coleman, Barbara Sanford Farrell, and William Pinney, Sr.

Plaintiffs-Appellants

vs.

Burlington Broadcasters, Inc. dba WIZN, Charlotte Fire & Rescue Services, Inc. and NYNEX Mobile Limited Partnership 1 dba Bell Atlantic NYNEX Mobile

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT OF UNDERLYING DECISION

Appellants (the Neighbors) seek review of an Opinion and Order of the U.S. District Court for the District of Vermont, dated August 8, 1997 (Order filed August 11, 1997), (Sessions, C.J.) granting Appellee Bell Atlantic NYNEX Mobile's (BANM's) motion to dismiss for lack of subject matter jurisdiction. *Appeal of Graeme*, 975 F.Supp. 570 (D.Vt.1997).[1] The Neighbors opposed the motion on two primary grounds: (1) that Congress had not granted the FCC authority to oversee radio frequency interference (RFI) of business electronic equipment and (2) that the

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[1] This is the way the case is cited by the federal reporter system. It should read, *Appeal of Graeme Freeman et al.*

authority to locate appropriate sites for telecommunications towers is local in nature and these matters are reserved to the states and therefore not preempted by the FCC.[2]

STATEMENT OF THE SUBJECT MATTER AND APPELLATE JURISDICTION

This case raises a claim under the Federal Communications Act of 1934 (as amended), 47 U.S.C. §§ 151-613 (1991 and Supp. 1997). The case began with a ruling of the Charlotte, Vermont Zoning Administrator, which was appealed to the Charlotte Zoning Board of Adjustment and then to the Vermont Environmental Court. Pursuant to 28 U.S.C. §§ 1441(b), Appellees removed the case to the United States District court claiming the federal court had original jurisdiction founded on a claim arising under the Constitution, treaties or laws of the United States. The Neighbors timely filed this appeal. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal raises three principal issues, each of which turns on a question of fact or law.

1. ***No Federal Authority to Regulate.*** In granting the Appellee's motion to dismiss, did the District Court erroneously rule that the local zoning order approving the location of the WIZN tower on the condition that the

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[2] Fraud and deceit, as independent state claims, were raised below and alone justify a denial of the motion to dismiss.

permittee's antenna not cause interference was preempted by the Telecommunications Act of 1934 (as amended)? The Neighbors believe the Act grants the Federal Communications Commission (FCC) no authority over radio frequency interference for *business* electronic equipment. 47 U.S.C. § 302a(a).[3]

2. ***Siting of Telecommunications Towers a Local Matter.*** In granting the Appellee's motion to dismiss, did the District Court erroneously conclude that states and towns have no authority to regulate the location of towers under traditional zoning concepts or to impose reasonable conditions over users and permittees of telecommunications towers to prevent or limit undue RFI over local businesses, schools and institutions? The Neighbors believe that preemption of state or local law cannot be inferred by law in this case and that the power to regulate the location of telecommunications towers is reserved to the state as promised by the Tenth Amendment to the U. S. Constitution.

3. ***Local Enforcement Decision.*** In granting the Appellee's motion to dismiss, did the District Court erroneously conclude that fraud and deceit were not raised below and so have no place in this case? The Neighbors disagree with this conclusion.

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[3] Appellees argued that Appellants have a remedy for their problems with interference through the FCC. As a subset of this argument, Appellants will demonstrate that no relief is available through the FCC. See p. 18 *infra*.

STATEMENT OF THE CASE

I. Procedural Case History

This case arises out of various local permitting decisions allowing the construction and location of a telecommunications tower owned by Charlotte Volunteer Fire & Rescue Service (CVFRS) and used by CVFRS and Burlington Broadcasters, Inc. d/b/a WIZN, and more recently by NYNEX MOBILE LIMITED PARTNERSHIP 1, d/b/a Bell Atlantic NYNEX Mobile.

In 1986 the local zoning authority denied the co-application by WIZN and CVFRS to construct a telecommunications tower on Pease Mountain in the town of Charlotte, Vermont on the grounds that it was not *located* in the commercial zone. The co-applicants reapplied and represented that they corrected the earlier problem by relocating the tower consistent with zoning requirements. Concerns were raised whether the tower would cause interference (RFI) where it was proposed to be located. A representative of the co-applicants stated that there would be no interference and if there was they "would trap it out." Appendix 119. This became a condition of the zoning permit issued January 7, 1987. *Id.*

Interference began almost immediately after WIZN went on the air in 1987. Complaints were made directly to WIZN but few of the complaints were adequately addressed. After the complaints of people in town were not addressed, several residents filed a complaint with the local zoning administrator. After investigating the complaint, the Charlotte Zoning Administrator issued a notice of zoning violation on April 5, 1996 against

CVFRS, the owner of the tower. The notice of violation cited CVFRS, WIZN and BANM for operating and/or permitting the operation of a broadcast facility that "has caused long term and continuous [radio frequency] interference ("RFI") with electrical devices in homes and businesses throughout the town." Appendix 125.

CVRFS, WIZN and BANM filed a timely appeal of the zoning administrator's decision with the Charlotte Zoning Board. Vt. Stat. Ann. tit. 24 § 4464(a) (Supp. 1996). The Neighbors made their appearance as parties to support the zoning administrator's decision. Vt. Stat. Ann. tit. § 4464(b) (Supp. 1996).

After a public hearing, the ZBA on July 11, 1996 ruled "that WIZN has caused continuous and widespread [radio frequency interference] that has impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of their homes and property." Nevertheless, the ZBA dismissed the notice of violation because it found that Congress intended to maintain federal jurisdiction over RFI phenomena and that the ZBA was without authority to regulate such interference.

On August 8, 1996, the Neighbors filed a Notice of Appeal of the ZBA decision to the Vermont Environmental Court. Vt. Stat. Ann. tit. § 4470 (Supp. 1996). On September 6, 1996, BANM and WIZN filed a Notice of Removal with the United States District Court for the District of Vermont claiming the district courts had original jurisdiction founded on a claim arising under the Federal Communications Act of 1934 (as amended), 47 U.S.C. § 151 *et seq.*

WIZN then filed a motion to dismiss with the U. S. District Court pursuant to Fed.R.Civ.P. 12(b)(6), and BANM filed a similar motion pursuant to Fed.R.Civ.P. 12 (b)(1) and 12(b)(6). Both motions essentially claimed that the Federal Communications Act preempts the Neighbors' zoning appeal. CVRFRS joined in both motions. After briefing and oral argument, the District Court granted BANM's motion to dismiss on the grounds of subject matter jurisdiction. WIZN's Motion to Dismiss was denied as moot.

The Neighbors filed this appeal on September 8, 1997.

II. Statement of Facts

The Neighbors are residents of the Town of Charlotte, Vermont, a small town approximately 12 miles south of Burlington, Vermont of about 3,200 people. They have experienced severe and continuing radio frequency interference of home and business equipment for the past ten years. This interference adversely affects their businesses, church and school. Their story began approximately twelve years ago.

In late 1986, WIZN, a commercial broadcaster operating an FM radio station under a license from the Federal Communications Commission ("FCC") and CVFRS jointly applied to the Town of Charlotte for a zoning permit to construct a 199 foot radio transmission tower on Pease Mountain. Initially, the Zoning Board denied WIZN's application because it was located outside the commercial area. Appendix 119. Following the initial denial, WIZN filed a new application.

The ZBA considered WIZN's second request for a permit at a public hearing on December 23, 1986. At the hearing, concerns were raised about interference to the community from the proposed WIZN tower. WIZN's representative, Michael Calhoun, addressed these concerns by stating to the ZBA, "[T]here will not be any interference and if there is, WIZN will trap it out." *Id.*

Based on the representations made by WIZN, the ZBA orally granted WIZN and CVFRS conditional use approval to construct the communications tower, subject to certain conditions. On December 24, 1986, the Zoning Administrator issued Zoning Permit No. 86-136-JO, listing WIZN as lessee of Henry and Marion Lane's property. The minutes state that "any other antennas authorized in Charlotte – the last one in does an intermodulation study and solves problems, if any." *Id.*

On January 7, 1987, the ZBA issued its Findings of Fact and Decision granting conditional use approval. Appendix 121. The Findings specifically found that any interference with reception because WIZN began broadcasting "will be remedied by WIZN." WIZN did not appeal the permit.[4]

Following the issuance of the permit, WIZN constructed the tower. Immediately thereafter, WIZN conveyed tower ownership to CVFRS. WIZN then signed a twenty-year lease agreement with CVFRS. On or about

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[4] Under Vermont law, the failure to appeal a decision of the ZBA binds all parties to the decision and prohibits them from raising such issues in subsequent cases. Vt. Stat. Ann. tit. § 4472(a) (Supp. 1996); *Town of Charlotte v. Richmond*, 158 Vt. 354, 356, 609 A.2d 638, 639 (1992).

April 17, 1987, WIZN began broadcasting from the tower. Interference within the town was noticed almost immediately and complaints were made to WIZN.

On October 16, 1991, the ZBA held a hearing on a proposal by CVFRS and Contel Cellular of Vermont (BANM's predecessor) to construct four whip antennas on the CVFRS/WIZN tower. During the hearing, members of the ZBA inquired as to whether Contel's proposal would create interference. In response to these inquiries, a representative of Contel Cellular, Charles Cannata, stated that "there would be none." Appendix 124. The permit was orally granted, subject to certain conditions. Mr. Cannata's assurances that there would be no interference was reflected in the October 28, 1991, Findings of Fact and Notice of Decision (Finding No. 4) issued by the ZBA. *Id.* Contel did not appeal the permit or its conditions.

Contel Cellular failed to conduct an intermodulation study following its construction of the four whip antennas as required by the underlying zoning permit approved in 1986.[5]

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[5] An intermodulation study is a condition of the January 7, 1987 zoning permit, paragraph 7. Appendix 121. "Intermodulation" is also known as "cross-talk," and it occurs "where dual broadcasts and harmonics are produced from one frequency interacting with another." Dwight H. Merriam, "Dealing with Locally Unwanted Land Uses (LULUS): Wireless Communications Facilities, 'Super' Service Stations, 'Satellite' Fast Food Restaurants, etc.," American Law Institute (1991), 124.

On April 5, 1996, after receiving complaints from residents and businesses that the co-permittees' had failed to comply with their permit conditions, the Zoning Administrator issued a Notice of Zoning Violation to Henry Lane, CVFRS, WIZN and BANM directing the parties to discontinue the violation and take the appropriate remedial action. Appendix 125-27. The Notice of Violation cited the continuous and widespread problems experienced in "homes and businesses throughout the town" caused by interference from transmissions from the tower.

On April 18, 1996, WIZN appealed the Notice of Zoning of Violation to the ZBA. Soon thereafter, BANM, CVFRS, and the Lane family joined in the appeal.

Immediately after the appeal was taken but prior to the public hearings, BANM and WIZN filed memoranda with the town explaining their right to file civil claims for attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988. See BANM Supplemental Memorandum (5/21/96), 8; WIZN Memorandum of Law (5/22/96), 10-11. Attachments A & B.

At public hearings conducted on May 22, 28, and 29, 1996, the ZBA heard extensive testimony from Charlotte residents, doctors, church officials, and school administrators regarding the pervasiveness of the interference problem. Several members of the local business community testified. For example, Dr. Frank Ittleman, Chief of Staff of the Cardiolothoracic Unit at Fletcher Allen Health Care, in Burlington, Vermont, a Charlotte resident, stated that he experiences difficulties while dealing with patients due to WIZN broadcasting from the tower. Dr.

Ittleman is consistently interrupted by WIZN radio broadcasting while speaking on the telephone with patients. Appendix 192-93. Pastor Mark Bolles of the Charlotte Congregational Church testified that WIZN could be heard over the public address system and through head-sets worn by hearing-impaired parishioners during Sunday services. Appendix 128. Holly Fournier of Mutual Fund Strategist, Ltd. stated that she experiences interference in her home, as well as in her business electronic equipment such as business computers, telephones, telephone systems, televisions and a postage meter. Appendix 130.

Guy Alderdice, Technology Coordinator for Charlotte Central School, testified during the hearings. Mr. Alderdice stated that the Town had invested over $400,000 in computers, cable television, and other technology for the school. This equipment continuously malfunctioned, consumed teachers' time, and most notably, affected students' learning. The school was incurring on-going additional expenses for equipment and repairs due to interference with their equipment. Appendix 132.

Dr. Denise Kessler, D.V.M., owner of a local veterinary clinic, testified that interference from the tower renders the clinic's Audio Patient Monitor useless. Dr. Kessler stated that "[t]he audio from WIZN is sometimes as loud as the patient heartbeat during anesthesia" resulting in "increased expenses as it is necessary for an assistant to monitor the patient's heartbeat when the Audio Patient Monitor is unusable." Appendix 133.

Frederic Lowen stated in his affidavit that "interference problems acted as a thorn in my side for many years

and contributed to my decision to close Vermont Custom Heating, Inc. in September 1996." Appendix 135.

Mary Beth Freeman stated in her affidavit that she was unable to conduct her consulting business due to interference with her equipment. Appendix 202.

In response to these and other complaints, WIZN admitted that it had received approximately 26 complaints during its first two years of operation and a limited number of additional complaints until 1995. Appendix 140.

During the course of the zoning board hearings a group of Charlotte citizens presented the ZBA with copies of questionnaires distributed to local residents and businesses during a recent survey. Eighty-eight respondents indicated that they experienced interference problems in their home or business.[6]

During the hearings, the ZBA also heard from a variety of experts. First, David Groth, WIZN's technical consultant, presented his report entitled: "Engineering Report, WIZN-FM Site, Pease Mountain, Interference Study and Recommendations," May 10, 1996. Appendix 204-7. Fred Lavenberg, WIZN's Chief Engineer, testified that the general interference is being caused by WIZN based on hearing or detecting WIZN music. Lavenberg was unable to identify the cause of the interference where WIZN audio was not heard.

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[6] The Town of Charlotte is a rural community comprising about 3,200 residents in an area of about 36 square miles.

Finally, Mark Hutchins, Broadcast Engineer, testified on behalf of the residents that WIZN's operations at the Pease Mountain site cause interference. Hutchins testified that WIZN knew or should have known in 1986 that its operations at this site would cause significant interference with residents, businesses, and institutions within the Town of Charlotte. He testified WIZN knew or should have known in 1986 that the interference could not easily be corrected and in many instances was not correctable without moving its antenna or significantly reducing the power. Hutchins testified that the addition of CVFRS' and BANM's operations on the tower could only have exacerbated the emission and interference problems. Appendix 146-47. He also identified sections of the FCC rules that expressly decline to preempt state and local authority over RF exposure matters or health and safety matters. Appendix 199, 200.

On July 11, 1996, the ZBA issued a Notice of Decision concluding that despite the reported interference causing "continuous and widespread RFI that has impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of th homes and property," the ZBA lacked jurisdiction to regulate such interference. Appendix 137-45. The Neighbors appealed the Notice of Decision to the Vermont Environmental Court. WIZN, BANM, CVFRS, and the Lane family removed the appeal to the District Court. WEN filed a motion to dismiss under Fed.R.Civ. P. 12(b)(6). BANM

filed a similar motion citing Fed.R.Civ.P. 12(b)(1)[7] and 12(b)(6).

ARGUMENT

I. Introduction

The District Court ruled in favor of BANM's motion to dismiss. It found federal preemption over local authority to regulate the location of telecommunications towers conditioned on the elimination of interference through zoning. Although the Court found no express preemption of local authority over the regulation of business electronic equipment, it found preemption by inference. Where "technical and engineering impediments" are involved in radio transmissions, the Court found the FCC enjoys exclusive authority. Appendix 350-51.

The Court also concluded that the actions of Charlotte town officials did not constitute decisions "regarding the placement, construction, and modification of wireless facilities," ruling out local jurisdiction as provided in 47 U.S.C. § 332(c)(7). It held that the offenses the local authorities reviewed were exclusively related to RFI, which is preempted. Appendix 354-55. Such complaints

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[7] BANM moved to dismiss action pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. In its September 6,, 1996 Notice of Removal, BANM asserted that the District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. Section 1331 states: "the district courts shall have original jurisdiction of all civil actions arising out of the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It is absurd that BANM then turned around and argued successfully that the federal court lacks subject matter jurisdiction.

as the Neighbors have here ought to be raised before the FCC, according to the Court, not in a local zoning forum. Appendix 359.

The Neighbors respectfully disagree with each of these conclusions of law, based on the statutory authority granted by Congress to the FCC. They have found no case supporting preemption of local authority to regulate the siting of towers for purposes of business electronic equipment. The Neighbors suggest that Congress never intended to preempt local zoning decisions on the placement of towers. This is shown through the plain meaning of Congressional enactments, particularly the 1982 amendments to the Act, which demonstrate how the FCC's authority is limited to regulations affecting interference with home electronic equipment, and not business electronic equipment. Should there be any ambiguity or confusion, the Congressional Record explicitly describes how the FCC has chosen not to regulate.

The Neighbors also suggest that a decision on the location of a tower is preeminently appropriate for local authorities to make. *A. T. & T. Wireless v. Virginia Beach, et al.*, Nos. 97-2389, 97-2513, 1998 WL 553666 (4th Cir., Va.). Such a decision does not require a working knowledge of technical or engineering esoteria, but is rather no different from the usual review that such officials make with any application for development.

II. Standard of Review

Appeals from District Court decisions on motions to dismiss are de novo. *Moccio v. New York State Office of*

Court Admin., 95 F.3d 195, 197 (2d Cir.1996). The applicable standard for this Court is the same as that employed by the District Court. On a motion to dismiss a complaint, the court simply determines its legal viability. *Samuels v. Air Transport Local 504*, 992 F.2d 12 (2nd Cir. 1993); *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir.1980). On such a motion only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991), *cert. denied*, 503 U.S. 960 (1992); *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir.1989). A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

When reviewing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the court must read the complaint with "great generosity." *Yoder v. Orthomolecular Nutrition Institute. Inc.*, 751 F.2d 555, 558 (2d Cir. 1985) (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)). The Court must take all plaintiffs (i.e. the Neighbors in this appeal) allegations as true, construe the complaint in the light most favorable to the plaintiff, and must draw all inferences in plaintiffs favor. *Cosmas v. Hasset*, 866 F.2d at 11; *Yoder*, 751 F.2d at 562.

In addition, there is a general presumption against federal preemption of state law. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The party claiming preemption has the burden of proof. *United States v. Skinna*, 931 F.2d 530, 533 (9th Cir.1990)

A. The Tenth Amendment Reserves Powers to the States. The Tenth Amendment guarantees that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is in a way an underscoring of the Supremacy Clause, which holds, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI. State laws that interfere with or are contrary to the laws of Congress are invalidated by this clause. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 513, 496 A.2d 151, 153, *aff'd*, *Presseault v. I.C.C.*, 494 U.S. 1 (1990).

B. Preemption Is Not Applicable. The District Court relied upon the *Cipillone* case to conclude that federal law preempts the regulatory powers of state and local governments over interference affecting business electronic equipment. *Cipillone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). *Cipillone* recognized three ways federal law can preempt local law: (1) expressly, as when the federal law says it preempts state or local law on the subject; (2) if the state or local law actually conflicts with federal law; or (3) when federal law so preoccupies a legislative field that no room is left for the states to supplement it. 505 U.S. at 516.

C. Field Preemption Is Not Applicable. The District Court concluded that the federal law in the present case is governed by field preemption. The Court found

legislative intent to provide the FCC with exclusive jurisdiction over RFI in the 1982 amendments to 47 U.S.C. § 302a. The District Count concluded, "Section 302a does not, expressly or by implication, authorize state or local regulation of the source of radio frequency interference." Appendix 353.

This is error. Federal legislation does not have to authorize state or local regulation; state or local regulation is allowed if federal regulation is silent. "All is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941). Surrender occurs through the actions of Congress. The power originally resides with the states, and needs to be taken away by Congress.

> [T]here is no phrase in the [U. S. Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly" and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, which the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

McCullough v. State of Maryland, 4 Wheat. 406, 4 L.Ed. 579 (1819).

D. There Is A Presumption Against Preemption.

The power of local governments to regulate land use is admittedly not unlimited. "Under the Supremacy Clause of the United States Constitution, where the Congress *has enacted a statute* which preempts a state or local law, the state or local government is without the authority to act within that area." (Emphasis added.) *See Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Haves, et al.*, No. 91-6140T, Slip op. at 6 (citing *Securities Industry Association v. Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989)), *cert. denied*, 110 S. Ct. 2559 (1990)). The general rule, however, is that there is a presumption *against* federal preemption of state law.

In *Cipollone*, the Supreme Court reaffirmed the presumption against federal preemption of state law. *See also, Broyde v. Gotham Tower, Inc.*, 13 F. 3d at 997. The rule in *Cipollone* is clear: Congress' enactment of provisions in legislation explicitly defining the preemptive reach of the statute means that "matters beyond that reach are not preempted." *Cipollone*, 505 U.S. at 517, 112 S. Ct. at 2618; *Broyde*, 13 F.3d at 997 (relying on the principle of *expressio unius est exclusio alterius).* See also *Keene Co. v. United States*, 508 U.S. 200, 212 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

E. Clear Statement/Plain Meaning Rule Applies. The clear statement rule also applies here. Statutory language is read narrowly by the court when the Commerce Clause is involved to determine whether Congress

intended to preempt the states. Laurence H. Tribe, *American Constitutional Law* (1988), § 5-8. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). As Professor Tribe explains the clear statement rule, "Congress must be prevented from resorting to ambiguity as a cloak to accommodate the competing interests bearing on the federal-state balance." *Id.*

When a statute is clear, there is no need to look beyond the statutory language to divine Congressional intent. *Goodstein v. Bombardier Capital Inc.*, 889 F. Supp. 760, 765 (1995); *United States v. Am. Trucking Assn. Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute that the words by which the legislature undertook to give expression to its wishes.") This is especially true when evaluating a preemption claim since preemption is not presumed. *Cipollone*, supra, 505 U.S. 504, 511 (1992).

The question of whether a particular regulatory field has been preempted by Congress turns on the purpose of the federal regulation or statute. In siting a nuclear waste facility, for example, the State of California decided to create a regulatory system to determine whether the location was economically feasible. The utility challenged the California act on grounds of preemption, and the U. S. Supreme Court determined that there was authority for the state to act, principally because its concerns were local (in this case, economic), while the concerns of the federal nuclear regulatory authority were principally related to safety, which is appropriately preempted. *Pacific Gas and Electric Company*, 461 U.S. 190 (1983);

Dalton v. Little Rock Planning Services, 516 U.S. 474 (1996) ("In a pre-emption case such as this, state law is displaced only "to the extent that it actually conflicts with federal law," citing *Pacific Gas and Electric*, 461 U.S. at 204).

Petitioners in Pacific Gas and Electric argued that the siting of nuclear waste facilities was preempted by federal law, but the Supreme Court concluded otherwise. It held that California could say "no" to a developer of a facility without offending the federal interest in ensuring that the nuclear waste facility was safe, because the purposes of the two regulatory approaches (state and federal) did not overlap, in the same way as Charlotte ZBA and the FCC each pursue different objectives. The roles are just reversed in the present case. In our case, the federal law seeks to ensure economic advantages for broadcasters, by seeking to prevent interference of signals between stations competing for the same airspace or through the regulation of home electronic standards, while Charlotte ZBA is responsible for ensuring that all development is safe, from sources that include the damaging impact of RFI on the quality of life, in this instance on business, church or school, in part through siting decisions. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, FCC 93-142, 58 FR 19393 (1993), Appendix 199, paragraphs 164, 166. There is no overlap here; indeed, there are no regulations purporting to cover business equipment by the FCC.

In a pre-emption case such as this, state law is displaced only "to the extent that it actually conflicts with federal law." *Id.*, 461 U.S. at 204. *See English v. General Electric Co.*, 496 U.S. 72, 84 (1990) (*citing Pacific Gas & Elec.*

Co. supra, 461 U.S. 190, 212-213 (1983)) (a state tort claim brought by an employee of a nuclear-fuels production facility against her employer was not pre-empted by a federal whistle-blower provision because the state law did not have a "direct and substantial effect" on the federal scheme). "[T]he rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985).

III. The FCC is Not Authorized to Regulate Business Electronic Equipment.

When a rock and roll radio station's broadcasts must be heard in church, because the broadcast overpowers the amplification system; when business computers, telephones and fax machines fail to work properly; when physicians cannot talk with their patients due to the din of a superstation; when school computers and telephones continuously malfunction; it is a local problem that requires a local solution.

Radio frequency interference is a byproduct of radio-frequency radiation. The placement of the source is the key to the direction and intensity of radio-frequency radiation and interference. Who regulates that placement is the underlying question in this case. The Neighbors believe no federal law prevents local regulation of the placement of these towers. It is not a technical or complicated subject. The science is generally available, and the people of a community have a right to plan and regulate local land use through reasonable zoning regulations and conditions.

The District Court accepted the arguments of WIZN, BANM, and CVFRS that federal law preempts the authority of state and local governments to regulate RFI. The Court's reasoning rests on the conclusion that the FCC has exclusive jurisdiction over the regulation of all types of RFI. The District Court also found that residents, businesses, school and church can lodge complaints with the FCC and that the FCC will resolve blanketing interference problems. This too is wrong. The FCC rules do not cover these matters. Cases upon which the District Court relies are based on either a town's attempt to regulate radio stations or a town's attempt to regulate "home electronic equipment or systems" under 47 U.S.C. § 302a(a)(2). They do not address interference of business and institutional equipment. Congress has explicitly made the determination that the FCC does not regulate such matters.

A. The Plain Meaning Demonstrates the FCC is Without Authority. The plain meaning and legislative history of section 302 of the Communications Act of 1934 (the "Act"), clearly shows that Congress' intent was only to regulate interference to "home electronic equipment" and interference between broadcast stations, not interference to business, office, institutional or medical equipment. State and local governments can regulate in these areas.[8]

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[8] WIZN and BANM need only locate a site which does not materially affect the Town and its citizens. Presumably, other locations exist. They should find such a location, obtain appropriate permits and conduct their business properly. There is nothing limiting their ability to do so.

In 1982, Congress amended the Communications Act of 1934 and established minimum electronic standards for "home electronic equipment and systems." Section 302a ("Devices which interfere with radio reception") provides in relevant part:

> (a) The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations
>
> (1) governing the interference potential of *devices* which in their operation are capable of *emitting radio frequency energy* by radiation, conduction, or other means *in sufficient degree to cause harmful interference to radio communications*; and,
>
> (2) establishing minimum performance standards for *home electronic equipment* and standards to reduce their susceptibility to interference from radio frequency energy.

47 U.S.C. § 302a(a)(1-2) (emphasis added). The plain language of section 302a(a) clearly limits federal regulation to devices which could in their operation "cause harmful interference to radio communications" of RFI and to "home electronic equipment." *Id.*(compare section 392a(a)(1) (dealing with interference potential of "devices" which could in their operation "cause harmful interference to radio communications") (emphasis added); and, section 302a(a)(2) (relating only to performance standards for "home electronic equipment" to protect it "from radio frequency energy").

Where Congress intended regulation over interference from radio frequency energy, it has known how to say so. Congress selected areas it felt were necessary to be regulated. See *Keene Co. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statutes but omits it in another . . . it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion."). *A.T.&T. Wireless v. Virginia Beach, supra*, at 6.

In this case, Congress was concerned with *all* devices that might interfere with radio communications. Subsection (1) is clear in this respect. However, in terms of radio communications interfering with electronic devices, Congress limited the FCC's authority to "home electronic equipment." This is clear in subsection (2). It is restrictive in its delegation.

B. Legislative History Proves No FCC Authority.

The plain meaning appears to answer the question clearly and succinctly, but in case this Court concludes there is some ambiguity and wants to look behind the veil of language into legislative history, there is ample evidence supporting the Neighbors' position that no preemption of business electronic equipment was intended. The legislative history shows that Congress did not intend the FCC to have exclusive control over all types of RFI. The Conferees Report cited in *Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, No. 91-610T (W.D.N.Y. 1991) and *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994), ends debate on the issue. Appendix 158. Congress *only* authorized the

FCC to regulate "home electronic equipment." Congress went to great lengths to distinguish the FCC's authority over home electronic equipment as opposed to business electronic equipment.[9] The Conferees Report states in pertinent part:

> The Conferees intend that the Commission's authority apply only to "home electronic equipment and systems" likely to be found in the private residence and intended for residential use, as distinguished from devices intended for office and business use.

U.S. Code Cong. & Admin. News, 97th Cong. 2nd (1982), 2237, 2276. Appendix 194, 195. Congress did not intend federal regulation in the form of performance standards for business or institutional equipment. The District Court's partial recitation of the Conferee's Report is not helpful to its analysis when the section on interference is read as a whole. Appendix 353.

The District Court cites a number of cases for the proposition that Congress intended to preempt "all aspects of RFI." Appendix 356-58. In fact, a brief review of the facts of these cases shows that they only dealt with "home electronic equipment" or interference between broadcasting stations.[10]

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[9] This explains why the FCC has not attempted to promulgate rules addressing business electronic equipment.

[10] *See e.g., In the Matter of Mobilcomm of New York, Inc.*, 2 F.C.C.R. 5519 (1987) (holding Town of Wilton, CTs regulation of interference between FM radio signals is preempted); *In the Matter of 960 Radio, Inc.*, 1985 FCC Lexis 2342 (FCC 85-78) (October 29, 1985) (holding a Klamath Falls, Oregon's

Appellees have previously argued that there are three cases which allegedly support their propositions. In *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky 1984), the Jefferson County Police Dept. filed suit against Louisville Two-Way Radio Corp., a commercial system seeking injunctive relief from interference with police broadcasts. *Helm*, 667 S.W.2d. at 691 (emphasis added). The Police Department's claim against Two-Way Radio

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conditional use permit regulating interference between existing FM and TV stations void due to preemption); *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W. 2d 550 (Minn. 1984) (holding FCC has exclusive jurisdiction to regulate interference between radio stations); *Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, No. 91-61OT (W.D.N.Y. 1991) (regulation of "home electronic equipment" is preempted; *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994) (same), and *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963) (the Court points to this decision as precedent the FCC has jurisdiction "over technical matters." Opinion at 11). That decision found that "State regulation based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Head* at 428. The footnote referenced by the Court in its opinion discussed technical matters "such as a frequency allocation, . . . " under 47 U.S.C. § 301. That section explicitly authorizes the FCC to "maintain the control . . . over all the channels of radio transmission;. . . . " It has nothing to do with the proper siting of a facility under zoning laws to limit interference within a town. The neighbors agree that technical matters dealing with frequency allocations and broadcast spectrums are complex, technical matters which are regulated by the FCC. Decisions relating to whether 50,000 watt broadcast antenna will cause significant interference of office equipment in a particular location can hardly be confused with frequency allocations or oversight of interference between broadcast stations.

alleged that the "entire radio communication system of the Jefferson County Police Department was interrupted for a period in excess of one hour due to wrongful interference by Two-Way." Id. at 692. The *Helm* case deals with interference between stations, i.e., a commercial station and police broadcasts, not business equipment. The court in *Helm* never addressed the central issue raised in the instant case. It found the plaintiff provided no support for his claims. *Helm* offers no judicial guidance.

In *Smith v. Calvary Educational Broadcasting Network*, 783 S.W. 2d 533 (Mo. App. 1990), the Missouri Court of Appeals, Southern District, Division Two, relying on *Blackburn v. Doubleday*, 353 N.W.2d 550, *supra*, held that it lacked subject matter jurisdiction over plaintiffs' nuisance claim because the authority to regulate RFI lies exclusively with the FCC. *Smith*, 783 S.W. 2d at 537. The Missouri lower court's opinion in *Smith* is the only opinion among all jurisdictions that even alludes to interference with "business appliances." See *Smith*, 533 S.W. 2d at 533. That is all the Court says about the subject. Nowhere does it address the central issue raised by the Neighbors in this case.

The gravamen of the plaintiffs' complaint in *Smith* was that the operation of radio station KOKS "cause[d] interference in the use by plaintiffs of electrical and electronic appliances located in plaintiffs' homes or businesses." Plaintiffs sought relief based on Missouri's common law doctrine of peaceful enjoyment. *Id.*

In dismissing plaintiffs' complaint, the Missouri lower court stated:

> *Blackburn* is the only case cited by the parties or found by the independent research of this court which addresses the issue of whether a state court has jurisdiction to enjoin the transmission of radio signals licensed by the FCC or to order a reduction in the operating power of such transmission.

Id. at 534.

None of the parties in *Smith* nor the *Smith* court itself discovered any of the cases cited by BANM, WIZN or the Neighbors. Thus, with no other precedent to refer to, the court became convinced by the *Blackburn* rationale, and dismissed plaintiffs' complaint.

The *Smith* court failed to recognize the distinction between "home electronic equipment" and "business equipment." In fact, it did not even discuss the distinction under the statute or the legislative history. Moreover, it wrongfully applied the rule from *Blackburn* which dealt with interference between radio stations, not interference to business equipment. Therefore, *Smith* has little, if any, precedential value here. BANM and WIZN's reliance on *Smith* as the sole case addressing RFI to "business appliances" is unfounded.

The third case offered as precedent by the Appellees in prior proceedings is *Fetterman v. Green, et al.*, 689 A.2d 289 (Pa. Sup. Ct. Feb. 4, 1997). But *Fetterman* is a case involving the interpretation of 47 U.S.C. § 333 (malicious interference with transmission) in which two radio frequency licensees (who were business competitors) collided with each other over the use of a particular channel. The Pennsylvania Court explained that if it asserted jurisdiction, "This would entail a state court deliberating over

exactly those types of technical matters which the Supreme Court itself has held to be outside the purview of our jurisdiction." 689 A.2d at 293.

The Neighbors do not dispute that the telecommunications law partially preempts state and local authority, but the preemption is limited to conflicts among licensees and conflicts involving home electronic equipment, as explained above. Business electronic equipment remains untouched by federal law. It is reserved to the states.

The latest case interpreting the authority of the FCC in relation to municipal regulation is *AT&T Wireless PCS Inc. v. City Council of the City of Virginia Beach, supra.* There the City Council denied appellees' application to erect a telecommunications tower;[11] the District Court ordered the Council to approve the tower; and the Fourth Circuit reversed, finding no violation of the Act. In explaining its decision, the Court wrote, "the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result." Decision at 4. Local regulation would not conflict with the purposes of the Act, according to the Court; "our reading simultaneously furthers the Act's explicit goals of facilitating competition, by strengthening the hand of new market entrants who cannot show that they have been unreasonably discriminated against, and

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[11] The *AT&T Wireless* case involved a cellular tower or a "personal wireless facility, as opposed to a broadcast facility like WIZN.

of preserving a large portion of local authority by maintaining that authority in particular cases." Decision at 5. The Act was never designed to destroy local authority to regulate towers, according to the Court, only to ensure that the review was fair and compatible with the purposes of the Act.

Just as in *A.T & T. Wireless*, the interference concern is a local neighborhood issue. It is a siting issue. A court's traditional discomfort with technical matters is not involved here, because no technical issues are involved. The issue is basic to zoning: where should something offensive best be placed. Charlotte thought it had the answer, when the applicants promised to cure any problems that arose. The zoning board agreed, but attached a reasonable condition. Now, when they are to be held to account for their promises, they claim preemption as a shield.

The plain meaning and legislative history of section 302a together with the case law show that Congress intended, and the courts have found, federal preemption only of local regulation of interference to home electronic equipment and between licensees, not of business and institutional equipment.

IV. The ZBA Has Authority to Regulate Questions of Siting.

"The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality in both urban and rural communities." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S. Ct. 2176, 2182

(1981). Local governments may exercise their regulatory power to institute zoning, when zoning reasonably relates to public health, safety, morals or welfare. *State v. Sanguinetti*, 141 Vt. 349, 351, 449 A.2d 922, 923 (1982). States may legislate on subjects relating to health, life and safety though the legislation may indirectly affect the commerce of the country. *Head*, 374 U.S. at 428, *supra*. Traditional bases of zoning regulation preserving the character of the neighborhood and avoiding aesthetic blight have been upheld by the Fourth Circuit. *AT & T Wireless, supra*.

A. The 1996 Amendments.

The 1996 amendments to the Federal Communications Act of 1934 provide compelling evidence of ZBA authority to regulate siting decisions. Section 107(a)(7) of the House bill, H. 1555 (1996), included preemption language stating that the FCC should adopt guidelines regulating the placement, construction, modification, or operation of facilities of commercial mobile services. H. 1555 as of May 3, 1995, Section 704(a)(7). Appendix 189. These preemption provisions were removed from the final version of the Act. As the U.S. Supreme Court has stated when divining congressional intent, "we are mindful that Congress had before it but failed to pass, just such a scheme." *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 526, 126 L.Ed.2d 524 (1983). Therefore, Congress clearly intended state and local governments to continue to control in this area as they have always done.

According to section 704 (1996), as long as state and local controls of "personal wireless service facilities" remain within the enumerated limitations, there is no federal preemption of state and local authority, except for health matters.[12] Appendix 196.

State and local government are the governments directly responsible for the health, safety and welfare of their residents. Narrowing their authority will significantly impair these governments' ability to function in ways essential to their existence. *Commercial Mortg. Ins. Inc. v. Citizens Nat. Bank of Dallas*, D.C. Tex., 526 F.Supp. 510, 523 (1981).

B. Section 253 of the Act.

Section 253 ("Removal of Barriers to Entry") of the Act provides:

> (a) IN GENERAL. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively

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[12] Congress has preempted the regulation of "radio frequency emissions." This has been interpreted by the FCC to preempt states from regulating the placement of personal wireless facilities on the basis of the effects from radiation. Appendix 199-200 (para. 166-67). The FCC has concluded that it has no such oversight over broadcast facilities. *Id.*

> neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, *protect the public safety and welfare*, ensure the continued quality of telecommunications services, and *safeguard the rights of consumers.*
>
> * * *
>
> 28 U.S.C. § 253.

Pursuant to section 253(b), the State of Vermont (and by delegation the Town of Charlotte ZBA) may impose permit conditions in zoning permits in order to protect the public health, safety and welfare and safeguard the rights of consumers. In its decision, the ZBA included conditions relating to interference in order to protect its residents who are consumers who rely on devices such as computers, modems, fax machines, pagers, telephones, and the like for their livelihoods. Subsequently, those conditions were violated by WIZN, BANM, and CVFRS. Therefore, the ZBA may issue a Notice of Violation. This section is broad enough to cover all consumers, although we acknowledge 47 U.S.C. § 302a(a)(2) authorizes the FCC to regulate minimum performance standards for "home electronic equipment." The Conferees Report was intended to insure that states and local governments not adopt minimum performance standards that might be inconsistent with the FCC's standards. Nevertheless, the courts in *Great Lakes* and *Broyde* applied that language to all regulation of home electronic equipment, including nuisance claims. The courts have apparently applied the third prong of the *Cipillone* test (field preemption) to extend home standards to home nuisance complaints. It would be wrong to extend this authority to business

electronic equipment, where Congress has purposefully withheld authority from the FCC.

C. Permittees Are Jointly Liable.

Among Appellees there has been some hope that one or another of the three ought to be liberated from liability because they were not directly involved in the interference. That was the decision of the ZBA. Appendix 141.

Under Vermont law, "co-permittees are both responsible for complying with . . . permits and share fault for the violations." *Secretary, Vermont Agency of Natural Resources v. Handy Family, Enterprises, et al.*, 163 Vt. 476, 486, 660 A.2d 312, 315 (April 14, 1995). Since BANM, WIZN, and CVFRS are co-permitees at the Pease Mountain site, they are to some extent responsible for complying with permits and share fault equally for permit violations, regardless of which causes the interference. Therefore, the ZBA has the authority to issue a Notice of Violation to BANM, WIZN, and CVFRS collectively for any and all violations by each individually.

D. The Neighbors' Remedies Are Not Available at the FCC.

The Appellees argue that the Neighbors are not without a remedy. BANM has contended that the Neighbors merely need to bring their concerns to the FCC. But the FCC has not adopted regulations covering this issue. Although the FCC has adopted regulations to resolve complaints of interference those regulations do not cover matters such as those being considered here. The FCC

rules address permanently and correctly installed *receivers*, within what is called the "blanketed area" which is where the signal is particularly strong and interference is likely. In addressing FM broadcast station blanket interference the FCC has specifically excluded from its rules most consumer devices. See Affidavit of Mark Hutchins. Appendix 146, para. 8.

Section 73.318 provides in relevant part:

> (b) After January 1, 1985, permittees or licenses who either (1) commence program tests, or (2) replace their antennas, or (3) request facilities modifications and are issued a new construction permit must satisfy all complaints of blanketing interference which are received by the station during a one year period. . . . Resolution of the complaints shall be at no cost to the complainant. These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers (phonographs) are also excluded.

Moreover, the Neighbors are not aware of any rules that govern the susceptibility of business or institutional electronic equipment. Affidavit of Mark Hutchins, *supra*. There has been no showing of any conflict or "overlapping" with federal law. See *Head*, 374 U.S. at 432.

The Neighbors' concerns are properly before the state and local tribunals. If they cannot find relief there, they

cannot look to the FCC, since it has not promulgated any rules to deal with these issues.[13] Jurisdiction is not inconsistent with interstate commerce or FCC regulation. Meaningful, reasonable regulation will enhance, not defeat, this industry. The FCC is without jurisdiction here. If further proof is required, consider that the FCC has not stepped in and declared the actions of the ZBA preempted. See Section 253 of the Act which provides that if a "State of local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d) (preemption).[14]

The law is clear that State and local government can regulate the type of interference being addressed in this proceeding. If a telecommunications or broadcasting

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[13] This is not surprising, since the FCC has no statutory authority to do so.

[14] Sections (a) and (b) of this section provide:

"(a) In general.

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

"(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

facility believes it has been denied its rights it has an explicit avenue to address any alleged violations. See also 47 U.S.C. § 704(a)(7)(B)(v) (legal redress).

V. Fraud and Deceit Are Independent Causes of Action.

In dismissing the suit, the District Court declared that the Neighbors' claims of fraud and deceit "were not part of the proceeding from which they appealed, and are not properly before this Court." Appendix 360. This too is error. The Neighbors raised the issue of fraud, deceit, and misrepresentation during the May 1996 hearings before the ZBA. The ZBA failed to explicitly address this claim in its April 5, 1996, Notice of Decision (but see Appendix 143). The ZBA did find, however, that WIZN made representations during the pendency of its permit application in 1986 that there would not be any interference and if there was, WIZN would remedy it. Appendix 119. The ZBA found this to be "particularly disturbing" in light of the pervasive interference that WIZN could not *trap out* and the undeniable harm and expense to the citizens of Charlotte caused by the interference. The ZBA also noted that Contel made similar representations upon which the ZBA had relied.

Furthermore, a witness for the Neighbors, Mark Hutchins, testified during the May ZBA hearings that WIZN knew or should have known in 1986 that a 50,000 Watt radio broadcasting facility placed in close proximity to homes, businesses, churches, and schools, would cause substantial interference. He also testified that WIZN knew or should have known that it could not "trap it out"

as it suggested to the ZBA when seeking its 1986 permit. See Affidavit of Mark Hutchins. Appendix 146.

Based on BANM's and WIZN's misrepresentations to the ZBA, they were granted permits. The co-permittees were in a position to have superior knowledge in addressing the local zoning board regarding interference. The co-permittees gained an unfair advantage due to their misrepresentations. The ZBA was mistaken that it had no jurisdiction to address this violation of the public trust.

Courts have long deferred to states with respect to claims for fraud and deceit. *In re Long Distance Telecommunications Litigation*, 831 F. 2d 627, 633 (6th Cir. 1987). Fraud and deceit are not preempted by the Communications Act because they fall "within the conventional experience of judges" and "do not require agency expertise for their treatment." *Id.*

Vermont courts have traditionally reviewed fraud claims under two separate doctrines: actual fraud and constructive fraud. Actual fraud is typically defined as deceitful misrepresentation or concealment with evil intent. *Proctor Trust Co. v. Upper Valley Press*, 137 Vt. 346, 354, 405 A.2d 1221, 1225 (1979). Constructive fraud, in contrast, is mere wrongdoing without bad faith. *Id.* "Constructive fraud may occur where a wrongful act injures another but is done without bad faith or a malevolent purpose on the part of the perpetrator. It may be found in cases involving misrepresentations that do not rise to the level of deceit, or actual fraud, and in cases where a party in a position of superior knowledge or influence intentionally gains an unfair advantage at the expense of

another person." *Hardwick-Morrison v. Albertsson*, 158 Vt. 145, 150, 605 A.2d 529, 532 (1992).

Accordingly, based on fraud, deceit and/or material misrepresentations the ZBA may revoke WIZN's, BANM's, and CVFRS' permits, as an alternative basis to the Neighbors' position on the preemption argument.

VI. Conclusion

The Town of Charlotte is not preempted from exercising reasonable oversight and control over radio and cellular services that cause pervasive, harmful interference to the Town and its citizens. Congress never intended the FCC to regulate the interference of business and institutional electronic equipment. Congress only authorized the FCC to adopt performance standards for home electronic equipment. Any ambiguity reveals that the Conferees expressly limited the FCC's authority to home electronic equipment. WIZN and BANM have misled the Town, caused significant harm to it, its school, church, businesses and citizens. They cannot continue to pretend the avenue for recourse for the Neighbors is to file a complaint with the FCC when the FCC is neither authorized, nor has it adopted regulations covering these matters. The Town must exercise its authority reasonably and may allow reasonable accommodation to WIZN and BANM within the Town, but it need not become a backwater, second-class town to accommodate these two services.

For the foregoing reasons, the ZBA has the authority to issue the Notice of Violation to WIZN, BANM, and CVFRS. Accordingly, Appellees' motions to dismiss

should be denied and the case remanded to the ZBA for findings in accordance with this decision.[15]

Dated at Montpelier, Vermont, this 9th day of October, 1998.

APPELLANTS

BY: /s/ Gerald R. Tarrant
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[15] The ZBA may provide WIZN, BANM and CVFRS a reasonable time to locate and identify an alternative site and move their facilities from the existing location. If that site is within the Town of Charlotte, they should re-file within a reasonable time and demonstrate they will meet all reasonable concerns of the Town and State.

97-9141

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, Willaim Pinney, Jr., Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmody, Mark Musiel, Michael Yantachka, Lorie Gaboury, Chris McGee, Peter Coleman, Barbara Sanford Farrell, and William Pinney, Sr.	)
Plaintiffs-Appellants	)
vs.	)
Burlington Broadcasters, Inc. dba WIZN, Charlotte Fire & Rescue Services, Inc. and NYNEX Mobile Limited Partnership 1 dba Bell Atlantic NYNEX Mobile	)
Defendants-Appellees	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

APPELLANTS' REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GRAEME AND MARY BETH FREEMAN, *et al.*, Appellants,	:	U.S. Appeals Court Docket No. 97-9141
v.	:	
BURLINGTON BROADCASTERS, Inc., *et al.*, Appellees.	:	

CERTIFICATE OF COMPLIANCE

Counsel for the appellants hereby certifies the following pursuant to F.R.A.P. Rule 32:

The reply brief I have filed on behalf of my clients is in compliance with amended F.R.A.P. 32. My brief uses a courier 14-point font, is under 650 lines and contains fewer than 7000 words. Specifically, my reply brief contains 4056 words and 370 lines.

Dated at Montpelier, Vermont, this 14th of January, 1999.

APPELLANTS

By: /s/ Gerald R. Tarrant

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INTRODUCTION

Pursuant to Fed. R. App. P. 28(c) Appellant Neighbors submit this Reply Brief to address arguments presented by Burlington Broadcasters, Inc., d/b/a WIZN ("WIZN") and NYNEX Mobile Limited Partnership 1 d/b/a Bell Atlantic Mobile ("BAM"), as well as the Federal Communications Commission (the "FCC" or the "Commission"), as *amicus curiae*.

Summary

Congress has been careful and deliberate in carving out the Commission's jurisdictional authority over radio frequency interference (RFI). Congress has not granted the FCC complete and unfettered jurisdiction over the telecommunications industry.[1] Congress has taken an active role in directing the FCC to areas Congress

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[1] In 1982 the Conferees intended that "the Commission's authority apply only to 'home electronic equipment and systems' likely to be found in a private residence and intended for residential use, as distinguished from devices intended for office and business use." App. at 195. The reference in the Conferees Report to exclusive FCC jurisdiction over such interference refers to home electronic interference when the reference cited by the Appellees and *amicus curiae* is read in context to what Congress was doing when it elected to extend authority to the FCC on home electronic equipment and not extend it on business equipment. Appendix ("App.") at 195, 240 and 255.

believed the Commission should regulate focusing primarily on interference between stations and devices which are capable of emitting radio frequency radiation in sufficient degree to cause interference *to* radio communications. *See* e.g. 47 U.S.C. Sections 302a (a) (1) and 303(f).

The FCC has jurisdictional authority to promulgate regulations relating to interference between radio signals and according to some courts the FCC may have "implied" authority to regulate interference to *home* electronic equipment based on the authority to establish minimum performance standards for *home* electronic equipment contained in 47 U.S.C. Section 302a (a) (2). WIZN and the FCC agree the FCC does not have any authority to regulate interference to business electronic equipment. WIZN at 35 and FCC at 11.

To extend the limited statutory language contained in the Telecommunications Act ("Act") to areas withheld by Congress ignores not only Congress' intent as expressed in the Act, but ignores the rule that "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Keene Co. v. United States,* 508 U.S. 200, 212 (1993). To overcome this presumption applied to statutory construction and the further presumption against federal preemption (Neighbors at 18-19) this Court must find that the state or local law actually conflicts with federal law or that federal law preoccupies the field. *Id.*

A preemption analysis must focus on the facts. Preemption cannot be guided by broad statements about the "comprehensive nature" of federal regulation under the Act. WIZN at 13, BAM at 9-10, FCC at 4-5, and ARGUMENT at I and II, below.

WIZN fails to understand the implications of Congress' 1996 amendments to the Act. WIZN at 7-8. The FCC erroneously relies upon the 1996 amendments to the Act for the proposition that Congress did not intend to interfere with the FCC's centralized control over radio communications.[2] FCC at 15. Congress elected to preempt local authority over radiation emissions only with respect to "personal wireless facilities" and then only to the extent they comply with Commission regulations. 47 U.S.C. Section 332(c) (7) (iv).[3] In 1996 the FCC declined to preempt local regulation regarding the effects of radiation emissions by broadcasters. App. at 200.

Since there are no FCC rules governing the regulation of RFI to business electronic equipment there can be no irreconcilable conflict. Since Congress has gone to great

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[2] See App. at 181. Section 108 of S.652 (10/12/95) contained a provision preempting state and local control of facility siting. Similarly, Section 107 (a) (7) of the House bill, H. 1555, included preemptive language stating the FCC should adopt guidelines regulating the placement, construction, modification or operation of facilities if commercial mobile carriers. (H. 1555 at 5/3/95) App. At 189-90. The preemptive provisions were removed from the final version of the 1996 amendments.

[3] App. at 199-200. According to the FCC it was only addressing "one of the environmental factors" from radiation emissions and was not adopting regulations relative to RFI. App. at 196.

lengths to provide states and local governments with sufficient authority to regulate the siting of a telecommunications tower there cannot be any legitimate claim that the FCC occupies the field or that local siting of a tower will pose an obstacle to the federal scheme.

The Court must appreciate how limited and local the issue of radio frequency interference really is. RFI results from signal radiation (BAM at 2) and is confined to a limited area that is defined by the radiation pattern as it rapidly dissipates from the antenna. RFI results from too strong a signal being located too near a community or business. It is first and always a local siting issue.[4]

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[4] WIZN erroneously asserts that this case does not involve a "siting decision." WIZN at 7 and 30. It ignores that it obtained a zoning permit to site its tower on the representations that it would not impose any interference and if it did it would "trap it out." App. at 119. BAM's objections that representations made during hearings that are not explicitly incorporated into conditions in a permit are not binding is too narrow a reading of Vermont law. BAM at 3, n.3. BAM cannot complain that WIZN or BAM's predecessor did not have notice of the concerns or that it was unaware that it would be held to answer when the information appears in the permit itself. App. at 119, 121, 124. The Charlotte zoning board is a lay body and it is clear that the zoning board of adjustment relied on WIZN's representations regarding interference in reaching the conclusions about siting the tower. The Vermont Supreme Court has not been troubled by findings that are conclusions or conclusions that are really findings. The most important issue is whether the parties were aware of the facts. *Gramatan National Bank and Trust Company v. Pierce*, 121 Vt. 406, 413 (1960) ["While to a large extent these particular findings are conclusions, they are however sustained by facts previously found and supported by the evidence, and no clear error can be predicated thereon. (citations omitted)"] This matter was raised at the District Court and accepted by it

The FCC's claim that allowing local communities the power to site telecommunication antennas based on RFI concerns would also give towns authority to "order changes in the power or location of stations" or "change its technical operating parameters" doesn't just exaggerate the issue, it misdirects the Court. FCC at 11. Providers can calculate where they believe their signal can be safely sited. They do this to meet FCC guidelines on RFR and perhaps as the FCC contends on the basis of "good faith." *Id.* Either the FCC does not understand the authority surrounding the *siting* of a tower or it is prone to drastically overstating its case.

WIZN, BAM and the FCC have pointed this court to decisions that preempt states and localities in nuisance and zoning matters involving interference *between* stations and different transmitters and devices (such as radio and police transmitters) that are explicitly preempted under 47 U.S.C. Sections 302a (a)(1) and 303(f).[5]

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without any objection or cross-appeal by BAM or WIZN. There should be no dispute what WIZN represented to the Town in 1986 at this stage of the appeal.

[5] *See* also 47 U.S.C. Sections 301 (FCC grants licenses for radio communications and stations who shall not interfere with other stations); 303m(1)(E) (FCC has authority to suspend license of operator who willfully or maliciously interferes with other radio signal); 305(a) (radio stations belonging to U.S. government shall not interfere with radio stations and shall comply with FCC regulations); 306 (a signal of a foreign ship within the jurisdiction of the U.S. shall comply with FCC regulations to prevent interference); 320 (radio stations shall not interfere with the transmission or reception of distress signals of ships); 321 (ship radio stations may be adjusted to produce the maximum of radiation, irrespective of interference, which may

They point to decisions that involve interference of *home* electronic interference where courts have assumed FCC jurisdiction over this type of electronic equipment because Congress had authorized the Commission to establish minimum performance standards of home electronic equipment.

WIZN and BAM point to decisions that recite limited language from the 1982 Conferees Report that indicates that Congress intended the FCC to have exclusive jurisdiction over the type of interference it was discussing in its report – which was over *home* electronic equipment. They fail to explain that the courts which cite this congressional history were doing so with respect to interference between signals and home equipment. *See* WIZN at 18-19 and BAM at 8-9.

Without any factual support, the FCC joins WIZN[6] and BAM in alleging "chaos," "confusion" and

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be caused when ship is sending distress signals.); 323 (interference between government and commercial stations is regulated); 354 (b) and (c) (technical requirements of radio equipment on ships).

[6] WIZN objects to the reliance of the Neighbors on affidavits filed with the District Court. WIZN at 10. The zoning board hearings did not have a court reporter and no formal transcript was made. The purpose of affidavits was to add structure to the appeal. Moreover, the zoning administrator and the zoning board each found interference to business electronic equipment based on extensive testimony. App. at 16, 21-22. The District Court found interference based on the testimony presented below. WIZN and BAM agree that extensive testimony was taken and that at least WIZN continues to cause interference throughout the town. WIZN at 16-17; BAM at 4-5. The harm to the businesses, the school and the church is real.

"impossibility" in performing their duties if the Neighbors prevail. BAM claims that uniform quality of service would be impossible if the industry faced "inconsistent and conflicting technical standards." BAM at 10; FCC at 10. It is the hobgoblin at work. The FCC has not adopted any technical standards relative to interference *to* business electronic equipment as each meekly acknowledges in its brief. *See* e.g. FCC 11; also App. 207.[7]

ARGUMENT

Each form of "telecommunications" has different frequencies and power levels, different audiences and purposes but each also has at least one thing in common – a radiation signal. Radiation manifests itself in three ways – its creates the telecommunication signal; it is the cause for health concerns and it can cause electronic interference. BAM at 2; App. at 208. Congress has had knowledge of these phenomena and has acted to grant authority to the FCC where its oversight is necessary or appropriate. The authority it granted to the FCC over interference matters had been restricted almost exclusively to interference to radio communication signals. It was not until 1982 when Congress decided to expand the

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App. at 128-136, 146-147. These affidavits were before the District Court, and to the best of our knowledge and belief were accepted and relied upon by the Court. No cross-appeal of that issue was taken by WZIN or BAM.

[7] This is a reference to WIZN's engineer's report which acknowledges the very limited regulations that apply to interference over home electronic equipment under Rule 73.318. *See* App. 186-7 for the rule.

FCC authority to regulate the performance standards of home electronic equipment that courts began to extend that statutory authority to cover interference to all home electronic equipment. There is no statutory authority governing interference to business electronic interference and not surprisingly no regulations have been promulgated by the FCC to govern these matters. FCC at 11.

I. THE FEDERAL COMMUNICATION COMMISSION HAS ONLY THAT POWER WHICH CONGRESS HAS GRANTED TO IT.

BAM, WIZN and the FCC openly accept those enumerated powers governing interference explicitly granted by Congress and then assert additional powers not granted by Congress to the FCC on the basis that what wasn't granted to them must have been "implied." In doing so, they concede, as they must, that Congress did not authorize the FCC to regulate interference to business equipment. WIZN at 35.

The FCC discredits the authority contained in Section 302a (a) and falls back to its mantra that "allowing states and localities to regulate radio stations to eliminate interference with business devices would undermine the centralized federal control of radio that Congress had sought to achieve." FCC at 13. The FCC and BAM prefer the theory that the FCC has authority over all "technical" matters.

This is not a case where there is statutory silence on the issue of interference and the FCC has asserted jurisdiction because there was a need to fulfill its other statutory responsibilities. Congress has acted carefully and

deliberately and spoken both affirmatively and negatively with respect to regulating RFI. The Act was amended in 1982 to grant the FCC to make regulations governing the interference from devices emitting sufficient levels of radiation to cause harmful interference to radio communications and to regulate the establishment of minimum performance standards for home electronic equipment. 47 U.S.C. Section 302a (a) (1) and (2). Its enabling legislation vests the FCC with the power to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the [Act]." 47 U.S.C. Section 303(f). *See Southwestern Bell,* infra at 1225.[8]

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[8] The regulations cited by the court relate to interference between or to FCC licensed or controlled stations or to residential areas. For instance:

1. 47 C.F.R. Section 0.111 (e) concerns the Compliance or enforcement division of the FCC and relates to interference to "authorized communications."

2. 47 C.F.R. Section 0.131(h) relates to cellular communications and pertains to interference over other cellular services.

3. 47 C.F.R. Section 22.353 concerns public mobile services and regulates blanketing interference similar to 47 C.F.R. Section 73.318. In both instances, the licensees are not only responsible for certain limited types of home electronic devices. The FCC represents that this covers radios and televisions but it would appear to be more limited than that. See FCC at 11.

4. 47 C.F.R. Section 24.237 concerns personal communications services and again only relates to interference between stations.

The FCC refers to section 73.318 of federal regulations which is nothing more than a limited provision to protect a few home appliances. FCC at 11; *see* App. at 186-7. It prefers unfettered discretion.

Under our constitutional system, administrative agencies are subject to the same checks and balances that apply to the other branches of government. An agency must operate for the purposes and within the bounds authorized by its enabling legislation.

Government can exercise only the powers granted to it has been recognized by our courts since our earliest days. Chief Justice Marshall wrote:

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5. 47 C.F.R. Section 90.173(b) relates to assignment of frequencies and requires those licensees with assignments to cooperate to reduce interference among themselves. It provides licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements." Section 90 defines "harmful interference" in Section 90.7 as follows: "*Harmful Interference.* For the purposes of resolving conflicts between stations operating under this part, any emission, radiation, or induction which specifically degrades, obstructs, or interrupts the service provided by such stations."

6. 47 C.F.R. Section 90.403(e). This section also speaks of licensees taking precautions to avoid causing harmful interference which is defined in Section 90.7, above, to mean interference between stations.

7. 47 C.F.R. Section 73.318 is the blanketing interference rule for broadcasters. See FCC at 11; App. at 186-7. It is limited to certain "common" receivers in the home.

> The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it should seem too apparent to require enforcement by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

McCulloch v. State of Maryland, 17 U.S. 316, 4 L.Ed. 579, 4 Wheat. 316 (1819); *South Carolina v. U.S.*, 26 S.Ct. 110, 199 U.S. 448, 55 L. Ed. 261, 4 Ann. Cas. 737 (1905); see also *Marshall v. Gordon*, 243 U.S. 521, 537, 37 S.Ct. 448, 61 L. Ed. 881 (1917); *United States v. Lopez*, 514 U.S. 549, 565, 115 S.Ct. 1624, 1633, 131 L.Ed. 2d 626 (1995); *Brown v. North Carolina Division of Motor Vehicles*, 987 F. Supp. 451, 456 (1997).

Administrative agencies exercise only those powers granted them by the elected branches of government and those others powers reasonably ancillary to the effective performance of their statutory responsibilities. This is the very meaning of a democratic republic. It matters little whether the FCC or its regulated industry believe the statutory powers granted in a particular case are inadequate to do what the regulated providers of the service may feel justice or efficiency would dictate. Administrative agencies are as much bound by the law as are the courts and other instrumentalities of government. As the Court in *Lopez* concluded, quoting James Madison, "The powers delegated by the proposed Constitution to the

federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 514 U.S. at 552, 115 S.Ct. at 1626, The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). The United States Supreme Court has characterized the "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[9] *Lopez*, 5145 U.S. at 552 quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

A. The FCC Has Traditionally Recognized Local Control.

The FCC has recognized the need to defer to local control over siting issues. It has found in the recent past that the Act does not preempt state or local control relating to environmental effects of radio frequency emissions from telecommunications facilities that do not fall within

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[9] Neighbors challenge the FCC's claim that the federal agency has the power to make "centralized" policy decisions that Charlotte businesses must accept interference to their business equipment. The FCC makes this claim without citing any statutory authority granting it such authority and is blind to the fact that simply moving an antenna (or siting it properly in the first instance) would remedy the problem. See FCC at 10 and 11. The FCC's reference to 47 U.S.C. 302a (a) (1) as support for its claim is not on point and does not grant the FCC authority to regulate non-radiating equipment or even those pieces of equipment that emit minor radiation or conduction. The purpose of that section is to regulate devices that may emit sufficient energy by radiation or conduction to cause harmful interference to radio communications.

the definition of "personal wireless facilities." App. at 199-200.

In 1996 the FCC addressed "one of the environmental factors" associated with radiation which focused on health impacts. App. 196. The FCC expressly limited its oversight to health impacts relative to personal services communications because of the limited statutory authority granted it by Congress. App. at 199-200.

In doing so, the FCC has explicitly found that it did not have exclusive jurisdiction over these technical matters but indicated if the industry "could prove" that local and state jurisdiction constituted an obstacle to the scheme of federal control of radio facilities that the industry would have to 1.) factually prove that factual allegation; and 2.) present the FCC with the legal basis which could justify FCC preemption. App. 200.

II. THE PREEMPTION INQUIRY MUST FOCUS ON THE PARTICULAR FACTS OF THE CASE.

The Appellees' arguments of "implied" authority, their generalities of FCC jurisdiction over all "technical matters" and their contentions that the FCC has "exclusive and plenary jurisdiction" all suffer from the same problem. Such generalities require more than mere assertions to overcome the *presumption* against preemption. In *Head v. New Mexico Bd. of Optometry*, 374 U.S. 424, 429-30, 83 S.Ct. 1759, 10 L.Ed. 2d 983 (1963) the court held that preemption "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal

regulation under the Federal Communications Commission." The preemption inquiry must focus on the particular facts of the case. *Id.* at 40, 83 S.Ct. 1759; also *Southwestern Bell v. Board of County Commissioner*, 17 F. Supp. 2d 1221, 1224 (D.Kan. 1998).

In *Southwestern* the Town had concerns relating to its public safety communications being interfered with by the wireless telecommunications provider. A legitimate concern but one which is preempted under 47 U.S.C. Sections 303(f) and 302a (a) (1). *Head* and *Southwestern* reveal the distinctions that must be made when evaluating this area of the law.

III. THE COURTS HAVE NOT PREVIOUSLY ADDRESSED THIS ISSUE.

WIZN and BAM have listed a string of cases they believe confirm the intent of Congress to preempt the Town from enforcing its zoning permit. WIZN at 1320; BAM at 25. The FCC adopts many of the same cases. It is instructive to distinguish these holdings on their facts. (Below we follow BAM's format. BAM at 20).

United States Court of Appeals

1. *Broyde v. Gotham Tower, Inc.*, 13 F. 3d 994 (6th Cir. 1994), cert. denied, 511 U.S. 1128, 114 S. Ct. 2137, 128 L.Ed. 2d 866 (1994). WIZN and BAM claim *Broyde* stands for the proposition that FCC has "exclusive jurisdiction" over RFI. BAM at 20; WIZN at 13. This case was an action on nuisance in which residents alleged that the defendants' radio signals interfered

with the operation of home electronic equipment. It is not on point.

United States District Courts.

2. *Great Lakes Wireless Talking Machine Co., d/b/a WZSH 95 FM v. Hayes, et al.*, CIV-916140T (W.D.N.Y. June 25, 1991). BAM asserts *Great Lakes* stands for the proposition that all claims that would obstruct FCC's ability to regulate RFI are preempted. BAM at 20-1. WIZN claims the case is virtually identical to the instant case. It refers the Court to App. at 256-69. WIZN at 16. The complaint *in Great Lakes* was based on interference to home electronic equipment. App. at 257-8. The Court found that despite broad authority of local governments over their quality of life, *"where the Congress has enacted a statute which preempts a state or local law,* the state or local government is without the authority to act within that area. (citation omitted.)" (emphasis added.) *Id.* at 261. Again, the Court referred back to the 1982 Conferees Report which the Court correctly found "stated their intent in amending section 302 of the Act." *Id.* at 264. It quoted the same portion of the Conferees Report referenced in *Broyde,* supra. including the passage that "(t)he Conferees believe that radio transmitter operators should not be subject to fines . . . imposed by any local or state authority as a result of interference appearing in home quipment or systems. Rather, Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission."[10] *Id.*

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[10] Compare this last sentence with the earlier statements by the Conferees that the Commission's authority does not extend to business equipment. See App. 195. ("The Conferees intend that the Commission's authority apply only to home electronic

3. *Still v. Michaels*, 791 F.Supp. 248 (D.Ariz. 1992). Both WIZN and BAM argue that this case stands for federal preemption. BAM at 20-1; WIZN at 14. The homeowner was asking for an injunction on interference to home electronic equipment. *Still* at 249-50. The court gave preclusive effect to an earlier state court's ruling (See case # 9, below). *Id.* at 250-1. The court based its decision on two FCC administrative determinations (nos. 11 and 12, below) in which the FCC determined that it had exclusive jurisdiction over interference between two radio stations and the holding in *Blackburn* (no. 6, below) which have nothing to do with interference to either home or business equipment.

4. *In re Appeal of Graeme and Mary Beth Freeman, et al.*, 975 F. Supp. 570 (D.Vt. 1997). This is the decision from which this appeal was taken.

5. *Southwestern Bell Wireless, Inc. v. Board of County Comm'rs of Johnson County, Kansas*, 17 F. Supp. 2d 1221 (D. Kan. 1998). BAM states that not only does this case cite *Freeman* but it "specifically reject(s) contentions that 1996 amendments to 1934 Act alter FCC's exclusive jurisdiction over RFI." BAM at 21. WIZN acknowledges that this case holds that "interference of public safety communications are preempted by the Act. WIZN at 14. This case deals with claimed interference between two signals – the local public safety communication signals and the signals of a cellular company. *Southwestern* at 1222. *See* 47 U.S.C. Sections 303 (f) and 303 m (1) (E).

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equipment . . . as distinguished from devices intended for office and business use.")

State Courts.

6. *Blackburn v. Doubleday Broad. Co.*, 353 N.W. 2d 550 (Minn. 1984). BAM represents that this case stands for the proposition that "subject matter of RFI lies within FCC's exclusive jurisdiction." BAM at 21. WIZN acknowledges this decision deals with interference between radio station signals. WIZN at 15. The decision is based on statutory authority contained in 47 U.S.C. Section 303(f). *Blackburn* at 552.

7. *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky. 1984). Both BAM and WIZN concede that this case stands for the proposition that states cannot regulate radio transmission over FCC signals. BAM at 21-2; WIZN at 15. WIZN claims that the police communication signals are really business electronic equipment. WIZN 23-4. Section 302a (a) (1). This decision is based on 47 U.S.C. Section 303(f).

8. *Smith v. Cavalry Educational Broadcasting Network*, 783 S.W. 2d 533 (Mo. App. 1990). This is the one case in which the introductory language to the decision refers to interference to equipment in homes and businesses. As previously discussed in Neighbors' Brief, except for its reliance on the *Blackburn* decision, the Missouri court failed to undertake a thorough analysis of the authorities or analyze the distinction between home and business equipment. Rather, the Court relies almost exclusively upon the 1984 Minnesota state decision in *Blackburn*, supra. Neighbors' at 30-2. Both WIZN and BAM characterize this case as precedent for the proposition that the FCC has exclusive jurisdiction over complaints of RFI to all electronic equipment. BAM at 22; WIZN at 15.

9. *Still v. Michaels*, 803 P.2d 124 (Ariz. Ct. App. 1990), review denied (Ariz. 1991). This is the state court's decision that ultimately found its way to federal

court and is listed as no. 3, above. Both BAM and WIZN claim this decision stands for the proposition that the FCC has exclusive jurisdiction over RFI. BAM at 22; WIZN at 14. The court held that an amateur radio operator's interference with *home* electronics was exclusively regulated by the FCC. *Still* relied on 47 U.S.C. Section 302a (a) (2). *Still*, at 125.

10. *Fetterman v. Green*, 455 Pa. Super. 639, 689 A. 2d 289 appeal denied, 695 A.2d 786 (Pa. 1997). Both BAM and WIZN claim that this decision upholds the federal preemption after the enactment of 1996 amendments to 1934 Act. BAM at 22; WIZN at 15. This is a case where one licensee brought an action against another licensee alleging interference by the other station. *Fetterman* involves the interpretation of 47 U.S.C. Section 333 (malicious interference with transmission) in which two competing radio stations collided with each other over the use of a particular channel. 47 U.S.C. Section 303(f).

FCC Administrative Rulings

11. *In the Matter of 960 Radio, Inc.*, 1985 FCC LEXIS 2342, at *78-85 (October 29, 1985.)[11] Both BAM and WIZN claim this decision stands for the proposition that the FCC has preempted local and state governments over RFI. BAM at 22; WIZN at 14, 19. WIZN acknowledges that this involves preemption over an attempt by a state to regulate two communication stations. This is an FCC decision that held that an

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[11] There were two different citations to this case. BAM refers to a decision dated October 29, 1985. WIZN refers to a decision of the same name dated November 4, 1985. It appears the two citations are to the same decision. The decision we reviewed was dated October 29, 1995.

Klamath Falls, Oregon permit regulating specific disputes between an FM and a TV station was void due to preemption. WIZN at 19-20. *See* FCC at 7.

12. *In the Matter of Mobilecomm of New York, Inc.*, 2 F.C.C.R. 5519 (1987). Both WIZN and BAM claim this decision stands for the proposition that the Act comprehensively regulates RFI and occupies that field. WIZN at 14; BAM at 22-3. The FCC in *Mobilecomm* ruled that the Town of Wilton, Connecticut's regulations of interference between FM radio stations was preempted by federal law. See FCC at 7.

In addition, BAM cites in a footnote *Winfield Village Cooperative v. Ruiz*, 537 N.E. 2d 331 (Ill. App.), appeal denied, 545 N.E.2d 135 (Ill. 1989). BAM at 21; FCC at 4. In *Winfield* an Illinois appellate court reversed the trial court and allowed a landlord to maintain a conviction action against tenant/amateur radio operator who caused interference to other tenants. The court held that the matter was a local matter, similar we submit to a local permit matter involving the Town of Charlotte. *Winfield* at 333.

In addition, WIZN cites the pre-1982 case *Schroeder v. Municipal Court of Los Cerritos Judicial District*, 73 Cal. App. 3d 841, 141 Cal. Rptr. 85, 87 (1978), appeal dismissed, 435 U.S. 990 (1978) for the proposition that "unquestionably, federal legislation has preempted local regulation of radio transmission, including assignment of frequencies, interference phenomena and the content of broadcast material." WIZN at 14-5. This is a correct, but limited, representation of that portion of *Schroeder. See Schroeder* at 846 citing *Allen B. Dumont Laboratories v. Carroll* (E.D. Pa. 1949) 86 Fed. Supp. 813, aff'd 184 F.2d 153, cert. denied 340 U.S. 929, 95 L.Ed. 670, 71 S.Ct. 490 (state censorship of television invalid); *United States v.*

Southwestern Cable Co., (1968), 392 U.S. 157, 20 L. Ed 2d 1001, 88 S.Ct. 1994 (cable television industry is under FCC regulation); and *Standard Television Co. v. Chronicle Pub. Co. (1960)*, 182 Ca. App. 2d 293, 6 Cal Rptr. 246 (allegations of "inferior signals" and conflicts between stations are regulated by FCC). It should be noted that *Schroeder* upheld local regulation of the height of a licensee's antenna. *Schroeder* at 848-9. The court found that an antenna at 40 feet would create interference 4,000 times stronger than as if the antenna were at 70 feet. *Id.* at 845.

IV. LOCAL SITING BASED ON RFI WOULD NOT CONFLICT WITH FCC REGULATIONS.

The FCC claims that local siting of towers would conflict with the federal regulatory scheme. FCC at 8-12. That scheme is based on a claim that Section 302a (a) (1) grants the FCC power to regulate "all of the devices at issue in this case."[12] The FCC doesn't explain itself further except to say that as a general condition of operation of these devices, they are subject to the condition "that interference must be accepted that may be caused by the operation of an authorized radio station, by another

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[12] Many pieces of business equipment such as dictation equipment, intercoms, audio and tape equipment, binding and laminating machines, calculators, clocks, date and time stampers, entry notification equipment, public address systems and audio headsets are not capable of emitting any radiation much less radiation sufficient to cause harmful interference to the FCC's regulated companies.

intentional or unintentional device. . . . or by an incidental radiator." FCC at 10. It then contends that it has made the judgment that public policy requires electronic "devices" must accept interference from radio stations. This policy must be compared with the authority actually granted to the FCC by section 302a (a) (1). That section authorizes the FCC to regulate devices which are capable of causing "harmful interference to radio communications." (emphasis added.) The FCC exaggerates its authority.

V. CONCLUSION.

The Neighbors respectfully request the Honorable Court reverse the District Court and remand this matter to the Vermont Environmental Court for it to remand it to the Charlotte Zoning Board with instructions that it has jurisdiction to enforce its zoning permit relating to interference matters affecting local businesses.

Dated at Montpelier, Vermont, this 14th day of January, 1999.

APPELLANTS

By: /s/ Gerald R. Tarrant
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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FREEMAN	)	
	)	Docket No.
-vs-	)	97-9141
BURLINGTON BROADCASTERS,	)	
ET AL	)	
	)	
----------	)	

COURT HEARING

As recorded on October 15, 1999

-before-

THE HONORABLE JUDGE WALKER
THE HONORABLE JUDGE NEWMAN
THE HONORABLE JUDGE SOTOMAYOR

APPEARANCES:

GERALD TARRANT, ESQUIRE, representing the Appellants;

BRIAN SULLIVAN, ESQUIRE, representing Bell Atlantic, Mobile;

JOHN CAIN, ESQUIRE, representing Radio Station WIZN.

COURT REPORTERS ASSOCIATES
117 Bank Street
Burlington, Vermont

[2] OCTOBER 15, 1999

JUDGE WALKER: Freeman against Burlington Broadcasters.

MR. TARRANT: May it please the Court, my name is Gerald Tarrant and I represent the Appellants in this matter.

The appeal concerns severe interference at the local level in the Town of Charlotte, Vermont, and we are appealing a District Court decision which ruled against us on a motion claiming that there was no subject matter jurisdiction. Interference when properly understood is a local siting issue if it is raised properly and in a timely manner. The issue of interference affects local interests; it does not affect the spectrum, it does not affect the management or administration of the FCC's duties in the context of how –

JUDGE SOTOMAYOR: I'm not sure how that statement is accurate. The FCC is charged with figuring out ways of having transmitters not interfere, it's charged with insuring that transmitters are put up because we need them. Why is it a purely state court siting matter then?

MR. TARRANT: Because the analysis [3] must begin with the statutes. Once we understand that the concern by Congress and it is tracked in the regulations that that concern relates to interference between stations, between FCC services –

JUDGE SOTOMAYOR: The problem with your argument is that the legislative history is completely contrary to your position. I mean, I have looked at the legislative history on the very provisions you rely on, and Congress repeatedly says We are not interfering with the FCC's regulation of interference. They raised the issue of whether to pass a commercial device provision and

decided they don't need to do it. I mean, I don't know how I read that legislative history and come to the conclusion that your definition of what their intent was should govern.

MR. TARRANT: I'm not familiar with any reference to an FTC oversight, but the Conferees' Report, if that is what Your Honor is referring to, which is cited at the appendix page 242 and 252 does contain a statement that the FCC has exclusive jurisdiction over RFI, radio frequency interference. On page 242 of the appendix, it specifically says that that jurisdiction is [4] exclusive as referred to in this section, and that section refers only to home electronic equipment. Similarly, if you go to –

JUDGE SOTOMAYOR: I'm not sure – the fact that they chose to mention one receiving device which is the home device, and those are receivers, not transmitters, the fact that they chose to pass a provision with respect to that, how does that lead me to the conclusion that they were foregoing their broader statement in the House Conference Report saying that they expected the FCC to have jurisdiction over transmitters, which is what is at issue here?

MR. TARRANT: The authorization given to the FCC over interference relates to interference between stations, licensees, ships, government authorities, and so on. Those sections are stated in my reply brief. They are specific and they are discreet. When we go to the Conferees' Report, that is dealing with a discreet item that was added in 1982 because there mere complaints about interference to home electronic equipment. It is absolutely essential for this court to understand that Section

302(a) of U.S. Code 47 deals with two aspects that are an exception to the statutory [5] authority that has been delegated to the FCC. The first one deals with RF devices. Those are the type of device that emit radio frequency, and again Congress has come out to say they are concerned and they are delegating authority to the FCC only with respect to the RF devices that have sufficient energy to interfere with radio communications. Again they are only –

JUDGE SOTOMAYOR: This tower is not an RFI transmitter?

MR. TARRANT: It's a – It transmits three different types of services: One is a radio service, an FM radio service; one is a Bell Atlantic cellular service and another is a local service.

JUDGE SOTOMAYOR: Is it an RFI transmitter?

MR. TARRANT: Well, it does emit interference radiation, that's correct.

JUDGE WALKER: Then it's a transmitter.

MR. TARRANT: It's a transmitter.

JUDGE WALKER: I thought that the legislative history in 1982 also pointed out that the conference substitute is intended to clarify the reservation of exclusive jurisdiction to the Federal [6] Communications Commission, and I'm reading, "over matters involving RFI. Such matters shall not be regulated by local or state law nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint."

Why doesn't that language cover this situation?

MR. TARRANT: You are probably either referring to page 242 or 255 of the appendix. On page 255, I believe, maybe it's 254, there is explicit statement –

JUDGE WALKER: My reference is to the U.S. Code Annotated, 2277.

MR. TARRANT: Right. Well my reference that I have at this moment, Your Honor, is the Conferees' Report that we laid out in our appendix, and it specifically states –

JUDGE WALKER: What page is that?

MR. TARRANT: 250 –

JUDGE WALKER: Of the appendix?

MR. TARRANT: I believe it's 255.

JUDGE WALKER: Okay.

MR. TARRANT: It might be 254, and this is important.

JUDGE WALKER: Yes. That is the same [7] language.

MR. TARRANT: Okay. It's the same one. If you go to 254 –

JUDGE NEWMAN: Yeah. Where on that page? It's a pretty crowded page.

MR. TARRANT: 254. It's right in the middle of the page, beginning with the word "authority" and then it continues: "Acquisition is well within the technical

expertise of the Agency. The Conferees intend that the Commission's authority apply only to home electronic equipment and systems likely to be found in a private residence and intended for residential use as distinguished from a device intended for office and business use."

JUDGE WALKER: But aren't they referring essentially there to the equipment that – they are not talking about transmitters. Transmitters, exclusive jurisdiction over radio transmitters had been established earlier, and I think what a later section is saying is that nothing alters that. Are you arguing that somehow the FCC does not have jurisdiction over radio transmitters now, that somehow it's abrogated the long-term authority of the Federal Communications Commission over radio transmitters?

[8] MR. TARRANT: Not at all, except that you have to understand that what Congress and the FCC have been working for is to oversee the transmitters in, terms of the spectrum, to allocate the spectrum so that each transmitter would have a frequency and that they would not interfere with one another. If you look at the sections in my reply brief that are laid out in the U.S. Code, they specifically deal with interference in terms of interference between FCC services and licensees and governmental services and signals and licensees. There is nothing that speaks to interference to devices until you get to 302(a). When you get to 302(a) there are two sub parts that are critical to this analysis because they go then to the regulations. The regulations by the FCC follow 302(a), one – Sub (a)(1) deals with RF devices. Those are devices, sophisticated devices that have radio frequency emissions that

are capable of interfering with radio signals. That was the concern by Congress. Sub 2 is a second section but that doesn't deal specifically with interference; it deals with establishing standards for minimum performance of home electronic devices.

JUDGE SOTOMAYOR: Counsel, that is my [9] problem. Your argument doesn't make any sense. Subdivision (a) deals with the transmitters. The issue here is the siting of a transmitter. The Conference Report says very clearly we are going to deal with transmitters through the FCC. The (b) section, the home device is a receiver, not a transmitter. Whether that receiver is at home or in a business, (a) covers it because the issue has to do with the transmission of the interference, not with its receipt.

MR. TARRANT: I beg to differ. My understanding of 302(a)(1), if you read that and the reference to devices deals with the sophisticated electronic devices like computers and even televisions that operate with some radio frequency, either conduction or radiation, and it could either escape unintentionally and it might interfere with a radio signal. Those are the –

JUDGE SOTOMAYOR: Counsel, read (a). (a)(1) says "governing the interference potential, "the potential of devices which in their operation are capable of remitting radio frequency energy." The towers at issue here, are they or are they not devices which in their operation are capable of emitting radio frequency, yes or no?

[10] MR. TARRANT: They are not the type of devices we have heard in 302(a) and 302(a)(1). They are –

JUDGE SOTOMAYOR: Where in the language are they not that type of device? I mean, this is a very broad statement. Any devices which in their operation are capable of emitting radio frequency energy; answer my question of why this tower is not capable of emitting radio frequency energy.

MR. TARRANT: It is capable and it does. Every signal and – every signal has radiation coming out and it has three effects: The signal, the radiation, health concerns and interference, those are the three effects. What I'm saying in my argument is that Congress over the prior forty or fifty years has dealt with the devices, the transmitters, the signals. They are the transmitters that are covered in the sections that I point out on page 5 of my reply brief, And therefore Congress has always, as you read the cases, prior to 1982 found that it exclusively regulates interference between towers, between radio stations. Those they always refer to them as radio stations. You go back to the Blackburn case that is [11] cited. They don't have to wait for 302(a), they already have that authority under 47 USC. That authority is under Section 301 and 303. And it wasn't until 302 when home electronic devices and other kinds of devices that could emit, we were starting to see sophisticated home electronic devices, home electronic devices that could emit radio frequency energy. They were not towers, they were not radio stations or licensees, but the radiation could emit – could be emitted and it might theoretically interfere with a radio signal.

JUDGE SOTOMAYER: So they used home devices in (a)(2) but didn't use it at (a)(1). Don't we have

statutory principles that if Congress knows what it intends that it should use the same word in both?

MR. TARRANT: That's correct. That's correct.

JUDGE SOTOMAYOR: But it tends to limit (a)(1) to the type of devices that you are talking about, why didn't it say? They used broader language.

MR. TARRANT: Your Honor, remember that what it's speaking of in sub one is interference to radio signals. They are not talking [12] about interference to electronic devices. They are still concerned with interference to the radio signal; that is its ultimate and only responsibility in terms of administering the spectrum. They want to make sure that ham operators and taxicab drivers and oil dispatching companies do not interfere with radio signals, and those radio signals are all in some form or another regulated and overseen by the FCC. Its only when you get to (a)(2) that they talk about home electronic devices as opposed to business devices, and that is where you have to read page 254 of the appendix to understand that Congress explicitly states: "We do not want the FCC to meddle into business electronic equipment." They state that. And that is critical to our argument.

JUDGE WALKER: Okay. We have your argument. Your time is up and we'll hear the other side now.

MR. SULLIVAN: Thank you. Good morning, Your Honors. I'm Brian Sullivan, and I'm here on behalf of Bell Atlantic Mobile.

I think the Court's questions really basically are the central issue of this appeal, and that is when you look at

radio frequency interference it's absolutely crucial to distinguish between the [13] transmitter that causes the interference and the receiving device that experiences it. Once that distinction is made and understood, I think the very laborious process that the Appellants have gone through becomes unnecessary. The legislative history is entirely clear, the authority over transmitting devices has existed from the inception of the Federal Communications Act. In no way is Congress attempting to limit that aspect of the FCC's jurisdiction in 1982. Instead, after having identified a particular problem and a particular class of receiving devices that were susceptible to interference, Congress was broadening the jurisdiction of the FCC. So now in the wake of the 1982 amendments, the transmitters, such as the services that Mr. Tarrant referred to that operate from this tower, continue to be subject only to the FCC in terms of interference they emit. However, with those amendments, manufacturers of receiving devices now may also be subject to FCC jurisdiction if those are consumer devices. Yes, the Congressional committee that looked at this stated the reason for distinguishing in 1982 between the consumer and non-consumer was that the consumer devices which is not built to adequate RFI rejection [14] standards, and that is why they created that distinction. But in no way, in no way does that abrogate the authority that the FCC has always had with the transmitters. Congress said that exclusively in the passages that Your Honor is referring to. Indeed, the cases of which there are about 12 or 13 that we cited all come down the same way with the exception of that one wrongly decided case we cited. All of those courts, state, federal, trial courts, appeal courts

and FCC administrative decisions all focus in on that language, and despite the characterization of those decisions that the Appellants have made, most of those decisions don't involve interference between radio transmitters. Most of them involve the same types of interference complaints that we have in this case, that a radio station or other transmitter is interfering with a home or a business receiving device, That is what is at stake in this case; that is what has been decided in all those other cases. Because those cases are so clear, because the legislative history is so clear, I think at this point, Your Honors, I would just refer you to our briefs and thank you for your time.

JUDGE WALKER: Very well. Do we have [15] anybody else?

MR. CAIN: Good morning, Your Honor. My name is John Cain, I represent WIZN.

We ask the Court to affirm the judgment down below, and the issue before the Court is really whether federal law preempts state law when it comes to regulating RFI. Before we get too far afield, I'd like to point out to the Court what the matter concerns here. The Town of Charlotte is attempting to regulate RFI. They issued a zoning violation against WIZN, Bell Atlantic and Charlotte Fire and Rescue. That is what this matter is about. Every single time in the reported decisions that we briefed that that has been happened, the court has ruled that there is total preemption and only the Commission can regulate RFI. The entire situation started back, passing the Federal Communications Act of 1934, and they sought to make some order out of the chaos that was happening with FM

radio. Before the passage of the Federal Communications Act, FM radio broadcasters were broadcasting on any frequency they wanted, there was no regulation, there was a lot of interference. So when the Federal Communications Act came along, the decision was made to centralize authority over the technical [16] aspects of radio broadcasting. And it has been held with uniformity that local and state organizations could not regulate RFI because total preemption so that the Commission can regulate the technical aspects of radio broadcast, and that is why we ask this court to affirm the judgment.

JUDGE WALKER: Very well.

MR. TARRANT: Your Honors, I would like to take my two minutes just to respond to a few comments that were made by Mr. Sullivan and try to bring it back to Judge Sotomayor's earlier questioning. If you turn to the FCC's brief on page 10, they will themselves differentiate between the transmitter and the electronic devices, the devices that are being referred to in 302(a), (a)(1). They state the state and local assertion of authority will also conflict with FCC regulation of electronic devices by authority of 47 USC 302(a)(a), the FCC regulates any device that may emit RF radiation intentionally or not under an extensive set of rules known as Part 15. The list of devices covered by Part 15 includes virtually all modern electronic devices, including all of the devices at issue in this case. And then it then cites to Section 15.101 and 15.3. If this court takes the time to look at [17] those rules and then looks at the rule, the blanketing interference rules, you will see that the FCC defines devices as things such as tape recorders, phonographs and those kinds of phone devices. Business devices are not included. More

importantly, if you look at 73.318 of the Federal Rules, 73.318 sub (b), it talks about the new transmitter, owner of the transmitter having to satisfy complaints about interference to devices, and then it excludes a number of kinds of devices, and specifically it identifies mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers; phonographs are also excluded. Your Honors, the FCC knew it had no authority over regulating interference to non-RF devices. It doesn't have any authority to regulate interference over RF devices; it only has authority under 302(a)(1)(a)(1) to regulate interference from those sophisticated enough RF devices that could have radiation emitted to interfere with a radio signal from a transmitter, That is only – that is the only authority that they have. And if you study Part 15 and you look at 73.318 that I just referred to, you will come to the same conclusion. If you then go back to the Conferees' Report and the pages [18] I referred to, you will understand where Congress said, we do not delegate to the FCC authority of business. You will understand that everything is in sync, the FCC is in lock step, and until the Freeman case and until the FCC filed this brief, the FCC believed that also. If you then go back to the cases cited, you will see cases referring either to interference between stations or interference to home electronic equipment. The only case other than Freeman that even uses the word business is I believe the Smith-Calvary case that is cited in the briefs, and that only refers to the Blackburn case which is a case between interference between stations. It was not analyzed correctly. I hope you are going to take –

JUDGE NEWMAN: Your argument from the Conference Report is that we should read it to mean the FCC cannot regulate the tower that sends out any interference to a business device. Am I right so far? Is that your point?

MR. TARRANT: Well –

JUDGE NEWMAN: That the distinction between home and office is the dividing line and that this Commission can't regulate what this radio tower sends out?

[19] MR. TARRANT: No, it can regulate – Sorry, Your Honor.

JUDGE NEWMAN: Go ahead.

MR. TARRANT: It can regulate what goes out and it does regulate what goes out in terms of interfering between other FCC services, FCC licensees, ships on the high sea and government entities, and those are all spelled out on page 5 of our reply brief. What it cannot – what it has not authorized and what the FCC cannot oversee is interference to electronic devices. The only exception is –

JUDGE NEWMAN: But I'm wondering if the inference to be drawn from the Conference Report is to prevent the Commission from regulating the business device itself, trying to promulgate industry-wide standards for those business devices.

MR. TARRANT: You are correct, you're focusing on 302(a), (a)(2), and that is correct. But the other statement also is given with home versus business and with the statement about exclusive FCC jurisdiction over

RFI, it dealt only with home electronic standards. That was it. Now the extensive –

JUDGE NEWMAN: Standards for that [20] type of equipment, but that's not this case, is it?

MR. TARRANT: No, it's not, but what has happened is that the courts that have dealt with home electronic equipment have gone to 308(a)(2) and then they go to the Conferees' Report and they find that one sentence that says: "It is our intent that the FCC have exclusive jurisdiction over RFI sandwiched between the statements about home electronic equipment and that they don't have any jurisdiction over business equipment. And so they have taken that and said, therefore – and they used this in terms of nuisance cases and you can look at the Broyde case, for example, comes to mind, the Great Lakes case is another one, they cite that for the proposition that since the FCC had jurisdiction over promulgating standards and Congress intended that it have exclusive jurisdiction, the states should have jurisdiction over interference to home electronic equipment. But I want to go back to the authority in the statutes. The only authority that talks about devices is 302(a), (a)(1), and that specifically talks about RF devices with sufficient radiation capable of interfering with the radio transmitter.

JUDGE SOTOMAYOR: Why is it that this [21] tower – you still haven't answered that for me. – why doesn't that definition fit this tower?

MR. TARRANT: Well, if for no other reason that the FCC has defined what RF devices are and in the FCC brief, and again I would refer you to pages 10 and 11 of the FCC's brief, they specifically in Section 302(a)(a)

authorizes the FCC to regulate any devices that may emit RF radiation intentionally or not with an extensive set of rules know as Part 15, and the list of devices covered by that part includes all the modern electronic devices, including the devices at issue. The only place that they are wrong there is it doesn't include very simple calculators, clocks, tape machines, tape recorders. Those kinds of machines have been frozen in our town. They are not regulated. Moreover, this section as Part 15 acknowledges only refers and authorizes regulation from the device to the radio signal from the transmitter. It doesn't not authorize the interference from the transmitter to the device, so therefore when the FCC concludes on pages 10 and 11 that they have made a public policy that all of these kinds of devices must accept interference, they had no authority to make that policy decision. [22] Congress has that authority and Congress has not spoken, and Congress has been specific that there should be no regulation. In fact, there has been no regulation of devices except for one element – promulgating standards for minimum performance standards. No other authorization is contained in the Communications Act.

JUDGE WALKER: I thought that the problem in 1982 was the development of these new technologies such as CB radios and the like that were difficult to control from the transmission side and were causing RFI problems with devices in the home, and therefore, they would regulate the receivers at home, whatever would be receiving radio transmissions. And that is why Congress said in the report at the time it's become evident that many interference problems involving home electronic equipment and systems are not fully resolvable through taking

protective steps with the transmitting equipment, but the resolution of these interference problems, some of these interference problems may require action with regard to receivers and other electronic devices picking up unwanted signals. And then they passed 302(a), (a)(2), and then Congress said thereafter in connection with [23] that, "The conference substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulations as part of any effort to resolve an RFI complaint," the same language that I read before. And maybe I'm missing something, but it seemed to me that the FCC always had jurisdiction over transmitters; they are now exercising jurisdiction over some receivers because they are having trouble dealing with RFI through their transmitter regulating authority, and so they decided to focus on these home devices which were – and regulate from that perspective.

MR. TARRANT: Yes, and I'm not going to disagree with –

JUDGE WALKER: Are you quarreling with anything I have said about this?

MR. TARRANT: I'm not, Your Honor. I would like to clarify it, however. In terms of what Congress has authorized regulation, they have authorized regulation for the FCC to insure that transmitters do not interfere with other FCC [24] services. They have extended that to government signals and ship signals, but they have never talked about authorizing the federal government to the

FCC to regulate electronic devices. It wasn't until 1982 because of all of the complaints that they elected to address home electronic equipment, and they made sure with respect to that that there was no extension of authority to business electronic equipment.

JUDGE WALKER: I understand that. But their original jurisdiction over radio transmission from radio transmitters such as towers like this which they always had was not altered.

MR. TARRANT: That's right. And no one has ever required –

JUDGE NEWMAN: Your point is it doesn't go far enough. I wonder if there hasn't been a lot of confusion, and maybe it's only on my part so I won't speak (unclear) a lawyer –

JUDGE NEWMAN: All this argument about the Conference Report and the big distinction between business – what is the phrase? office and business use versus home – that really seems to me has nothing to do with your basic argument that the Commission's authority over radio transmitters [25] simply doesn't go as far as they say it goes.

MR. TARRANT: That's correct. That's correct.

JUDGE NEWMAN: This whole issue to develop a negative inference out of the distinction between business and home is, in my mind at least, is beside the point.

MR. TARRANT: It's beside the point. it only becomes a matter of importance because when you read the cases, a number of the states and even of the federal –

JUDGE NEWMAN: A number of the cases have been misled. But your point doesn't turn on that distinction. That distinction in the Conference Report, office and home equipment, I think you are saying, has to do with whether the Commission can regulate those bits of equipment. It can regulate the home equipment to be sure it is designed up to snuff so that it won't malfunction but the business apparently has its own set of standards so they didn't have to deal with that.

MR. TARRANT: That's correct.

JUDGE NEWMAN: So that is what they can do with the devices that are in the home or the office. Now the question is what can they do with [26] the radio transmitters? And you are saying they can do a lot of things with the radio transmitter. They can prevent it from interfering with other radio transmitters and all the other things you listed, but their radio transmitter authority doesn't go as far as to do what they did, what they are trying to bring up here. Is that your point?

MR. TARRANT: Yes. Yes.

JUDGE NEWMAN: And I'm not saying that I agree with you, I'm just trying to understand your point.

MR. TARRANT: And the only point on that is when you look at 302(a), (a)(1) when they do talk about RF devices, devices that emit radio frequency energy, they are still talking this time from the electronic devices emitting energy that could interfere with the transmitters, the signals and the services that they have always concerned themselves with. They have never concerned – Congress has never concerned itself with except under

302(a)(2) with standards or devices. Until 1982 it was limited. And therefore if you look at Part 15 and you look at the other section that I cited in terms of the blanketing interference, you will see that the FCC has stated that authority and [27] they do not regulate these matters, and the reason is they don't have authority.

JUDGE WALKER: All right. We'll reserve decision. Call the next case.

[28] CERTIFICATE

I, Carol A. Boone, Notary Public and Court Reporter, hereby certify that the foregoing pages, numbered 2 through 27 inclusive, are a true and accurate transcription to the best of my ability of an audiotape in the matter of FREEMAN, ET AL -v- BURLINGTON BROADCASTERS, ET AL, taken on the 15th day of October, 1999, at the United States Court of Appeals, Second Circuit.

I further certify that I am not related to counsel, counsel's law firm, nor any party to the case in this matter, nor do I have any interest in the outcome of the case.

/s/ Carol A. Boone
Carol A. Boone, Court Reporter